



In the Supreme Court of the United States
OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND
NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

HAITIAN CENTERS COUNCIL, INC., ET AL.

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QUESTIONS PRESENTED

1. Whether the laws of the United States, including § 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h), bar executive officials from forcibly and summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.
2. Whether the courts below properly held that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new policy of forced return without screening.
3. Whether the Immigration and Nationality Act or the Administrative Procedure Act permit the district court to review and enjoin a lawless policy of forced, summary return of Haitian aliens to Haiti.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND
NATURALIZATION SERVICE, ET AL., PETITIONERS,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT

I. Background

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267 ("Protocol"), and accepted as domestic law the 1951 Refugee Convention ("Refugee Convention"). Article 33 of the Convention mandates, categorically and without geographic limitation, that "[n]o Contracting State shall expel or return ("refouler") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion" (emphasis added) (Joint Appendix ("J.A.") at 400). In the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980), 8 U.S.C. § 1253(h) (1988), Congress amended § 243(h) of the Immigration and Nationality Act ("INA") to conform to Article 33. By deleting the preexisting limiting language "within the United States," Congress specified that "[t]he Attorney General *shall not* deport or *return* any alien... to a country if the Attorney General determines that such

alien's life or freedom would be threatened . . . " 8 U.S.C. § 1253(h) (emphasis added) (J.A. at 365).

The following year, the United States began interdicting, screening, and returning Haitians found in international waters, pursuant to a bilateral executive agreement signed with the Haitian government. Agreement Effectuated by Exchange of Notes, September 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241 ("U.S.-Haiti Agreement") (J.A. at 380). That agreement authorized the United States to return "detained vessels and persons to a Haitian port," but expressly acknowledged that even on the high seas the United States was bound by "*international obligations mandated in the Protocol Relating to the Status of Refugees*" (emphasis added). *Id.*¹ Evaluating the legality of this proposed program, the Justice Department's own legal counsel concluded that, even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims." "Proposed Interdiction of Haitian Flag Vessels," 5 Op. Off. Legal Counsel 242, 248 (1981) ("OLC Opinion") (emphasis added) (J.A. at 316-17). Accordingly, Executive Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), reprinted in 8 U.S.C. § 1182 (1988), which issued shortly thereafter, directed that in regard to aliens interdicted in international waters, the

Attorney General shall . . . take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration . . . and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.*

Section 3 (emphasis added), Petitioners' Appendix ("Pet. App.") at 265a.

Thus, Article 33 of the U.N. Convention and Protocol, § 243(h) of the Refugee Act, and the U.S.-Haiti Agreement all prohibited petitioners from returning Haitians interdicted on the high seas to conditions of persecution without first making

¹"[U]nder these arrangements," the accord declared, "the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." (J.A. at 382).

individualized determinations regarding the credibility of their claims of persecution. Pursuant to these legal mandates, for more than ten years petitioners pursued an interdiction program of "preliminary screening before return." Pet. App. at 10a. Under this program, "[a]ny interdictees who made a credible showing of political refugee status were tentatively 'screened-in' and brought to the United States, where they could file a formal application for political asylum Interdictees unable to make such a showing were "screened-out" and returned immediately to Haiti." Petitioners' Brief ("Pet. Br.") at 3.

II. *HRC v. Baker*

In November 1991, Haitians began fleeing following the September 30, 1991 military coup that overthrew the government of President Jean-Bertrand Aristide. Petitioners continued their policy of "screening out" and returning to Haiti interdicted Haitians who lacked credible fears of persecution, but began housing "screened-in" Haitians at the United States Naval Base at Guantanamo Bay, Cuba. In November 1991, Haitian Refugee Center (HRC) brought a suit in the Southern District of Florida challenging the adequacy of the initial screening procedures on behalf of itself and a class represented by fifteen named plaintiffs, all of whom had been "screened-out." *HRC v. Baker*, Second Amended Complaint at ¶ 9-24 (J.A. at 97-104).

At that time, only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti. The *HRC* class included only "screened-out" Haitians, i.e., persons who had been harmed by alleged inadequacies in the initial screening procedures.² The district court issued several injunctions

²The class certification papers represented that "[t]he 15 [screened-out named] plaintiffs represent claims that are in every respect typical of the claims of the class." Class Cert. Mem. at 9 (J.A. at 126). Explaining that they were "challenging INS policies concerning the screening of potential asylees," Class Cert. Mem. at 6 (J.A. at 130), the fifteen named plaintiffs moved to certify a class consisting of

all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the seas pursuant to the United States Interdiction Program and who are being denied First

(continued...)

against petitioners' conduct, which the Eleventh Circuit reversed in two separate rulings. Pet. App. at 171a, 190a. In opposing *certiorari* in *HRC*, the Solicitor General specifically represented to this Court that

Under current practice [followed for more than a decade], any ["screened-in"] aliens who satisfy the threshold standard *are to be brought to the United States* so that they can file an application for asylum under section 208 (a) of the [INA]....These 'screened in' individuals then have the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

(Emphasis added) (J.A. at 252).³ Yet only five days after this Court denied *certiorari* in *HRC*, petitioners broke that promise, began reinterviewing and repatriating "screened-in" Haitians *on Guantanamo* without lawyers, and repatriated many of these "screened-in" Haitians to Haiti.

III. *HCC v. McNary I*

Respondents then brought this action in the Eastern District of New York on behalf, *inter alia*, of "[a]ll Haitian citizens who have

2(...continued)

Amendment and procedural rights.

Class Cert. Motion at 2 (J.A. at 119). Their supporting memorandum made clear that

[t]he individual plaintiffs . . . were intercepted by the United States Coast Guard pursuant to a 'program of interdiction' that permits interception and repatriation of undocumented aliens. . . . They have all been 'screened out' . . . Effectively, as a result, each of these plaintiffs would be forcibly returned to Haiti . . . were it not for the Court's order.

Class Cert. Mem. at 2 (J.A. at 126-27). Only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti. Petitioners did not oppose the motion or respond to the Memorandum. Accordingly, the district court certified the class without a hearing or opinion. Order of December 3, 1991, *HRC* (J.A. at 89).

³Solicitor General's Response to Petition for Certiorari in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992), at 3.

been or will be "screened-in," Memorandum of Law in Support of Plaintiffs' Motion for Provisional Class Certification at 3 (J.A. at 281), challenging petitioners' new policy and seeking an order that no "screened-in" Haitian on *Guantanamo* could be reinterviewed or repatriated without counsel.

The district court (Johnson, J.) issued a temporary restraining order ("TRO") and a preliminary injunction against petitioners' practices. In so holding, the *HCC* court concluded as a matter of law that the class of Haitian plaintiffs in *HRC* were "screened-out," and conditionally certified the class of "screened-in" plaintiffs, "a new class which is not bound by the outcome in *Baker*." Pet. App. at 150a, 162a. The court further found that respondents' complaint "raises new claims which were not litigated in *Baker*," *id.* at 151a, and that it would be "particularly unfair to bind the Screened-In Plaintiffs by the outcome in *Baker* when their cause of action arises from Government conduct occurring after the conclusion of the *Baker* litigation." *Id.* at 150a. The Second Circuit affirmed with modifications. *HCC v. McNary*, 969 F.2d 1326, 1337 (2d Cir. 1992) ("*HCC I*"), Pet. App. at 117a.⁴ In each ruling, both courts rejected the government's claim that respondents were somehow collaterally estopped by the Eleventh Circuit's ruling in *HRC*, holding that "the class defined in [*HRC*] was overly broad, [and] that the issues presented in the present suit were not actually litigated or determined" there. Pet. App. at 93a. See also Pet. App. at 133a-36a, 149a-52a (District Court ops.).

IV. *HCC v. McNary II*

On May 24, 1992, pursuant to a new order issued by President Bush from Kennebunkport, Maine, petitioners dispensed with their legal obligations not to return aliens to a country where such aliens' life or freedom would be threatened. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) ("Kennebunkport Order"), Pet.

⁴The Government's petition for rehearing and suggestion of rehearing *en banc* were denied on July 24, 1992. The Solicitor General has petitioned for a writ of *certiorari* to review the Second Circuit's decision. See No. 92-528, *McNary v. Haitian Centers Council, Inc.* Pursuant to this Court's orders, respondents' time to respond to the Government's petition in *HCC I* has been extended to March 10, 1993.

App. at 260a-63a.⁵ Instead, petitioners Coast Guard and Immigration and Naturalization Service (“INS”) instituted a new interdiction program of “summary return without screening,” Pet. App. at 10a, forcibly returning *bona fide* refugees, without any process or questioning whatever, to conditions of persecution and death in Haiti.⁶

On the day that this new interdiction program began, upwards of 30 percent of all Haitians interdicted were being “screened into” the United States by INS Asylum Officers as having credible fears of persecution in Haiti. *See P.E.* 88 at 34 (J.A. at 66). But with the stroke of a pen, petitioners declared their indifference to the fears of interdicted Haitians, even as political violence in Haiti spiraled to unprecedented levels.⁷ Moreover, notwithstanding § 243(h), § 2(c)(3) of the Kennebunkport Order purported to give petitioner Attorney General “unreviewable discretion” to deny that any interdicted Haitians arriving after May 24 had bona fide fears of political persecution.⁸

Pursuant to this new interdiction program, petitioners have forcibly repatriated more than 2,000 Haitians without any procedures whatever and in total disregard of their fears of political

⁵Although petitioners now claim that the Kennebunkport Order was triggered by foreign policy exigencies, section 3 of that Order clearly states: “This order is intended *only* to improve the internal management of the Executive Branch.” Pet. App. at 262a (emphasis added).

⁶See *HCC II*, Pet. App. at 13a (“[T]he Kennebunkport Order . . . made no pretense at all of adhering to the Solicitor General’s prior representation to the Supreme Court. On the contrary, it permitted a policy, subsequently implemented, of *no* screening whatsoever.”) (emphasis in original). Petitioners claim that “Coast Guard instructions” permit commanding officers of Coast Guard vessels to grant temporary refuge to interdictees “in immediate and exceptionally grave physical danger, based on either the officer’s observation or compelling statements by the individual.” Pet. Br. at 7 n.5. But respondents know of no instance when this exception has been invoked, or of any evidence that Coast Guard commanders have the time, the expertise or the training necessary to conduct meaningful asylum interviews on shipboard.

⁷See generally Briefs Amici Curiae of Americas Watch and Amnesty International; Lawyers’ Committee for Human Rights, *Haiti: A Human Rights Nightmare* (1992).

⁸See Kennebunkport Order, § 2(c)(3) (“[t]he Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.”). Pet. App. at 262a.

persecution.⁹ On May 28, 1992, respondents moved for a TRO on behalf of members of the “screened-in” class, challenging petitioners’ new policy as *ultra vires* and violative of § 243(h) of the INA, Article 33 of the Refugee Convention, the U.S.-Haiti Agreement, the Administrative Procedure Act (“APA”), and the Equal Protection guarantee of the Fifth Amendment Due Process Clause.¹⁰ The district court denied relief, but condemned the change in U.S. policy in the harshest possible terms, holding that “[p]laintiffs undeniably make a substantial showing of irreparable harm.” *Id.* at 166a.¹¹

⁹Pet. Br. at 3 n.2 & Coast Guard Public Statistics. In lieu of asylum processing in either Miami or Guantanamo, petitioners offered to process refugee claims at the U.S. Embassy and Consulate in Port-au-Prince under § 207 of the INA, 8 U.S.C. § 1157, noting that more than 9,000 applicants have sought refugee status through this route. Petition for Certiorari (“Pet.”) at 9 n.6, 30 n.17. As we note below, the availability of one form of refuge under the INA—§ 207 embassy processing—cannot justify petitioners’ unilateral elimination for Haitians of two other forms of statutory relief: § 243(h) protection against involuntary return, 8 U.S.C. § 1253(h), and § 208 asylum relief, 8 U.S.C. § 1158. Moreover, of the nearly 9,000 refugee processing applicants, respondents are aware of only 114 that have been even conditionally approved.

¹⁰All of these claims had been counts in the original complaint. (J.A. at 34-35). In their TRO request, respondents noted that petitioners’ new policy immediately endangered three subgroups of the “screened-in” class: (1) some 150 Haitians (including at least one named plaintiff) whom petitioners had repatriated to Haiti even though petitioners had previously “screened” them in; (2) Haitians with credible fears of persecution who would be interdicted and would have been “screened-in” but for the new policy; and (3) unscreened Haitians on Guantanamo who would be “screened-in” but were now at risk of summary repatriation subject to the Attorney General’s purported “unreviewable discretion.” *See Pet. App.* at 8a. Subsequently, petitioners screened all Haitians on Guantanamo, shifting some members of the third group into the screened-in category.

¹¹ It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government’s conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement. As it stands

(continued...)

On expedited appeal, the Second Circuit reversed and remanded with instructions to enter the injunction. Writing for himself and Judge Newman over Judge Walker's dissent, Judge Pratt rejected the Government's claim that the case is not judicially reviewable. *Id.* at 38a. The majority further denied that respondents were collaterally estopped by the Eleventh Circuit's prior ruling regarding § 243(h) in *HRC v. Baker* because that case involved different parties and changed circumstances. *Id.* at 7a-14a.¹² On the merits, the majority concluded that "the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors" constitutes the "return" of "any alien" forbidden by the plain language of § 243(h). Pet. App. at 23a.¹³ Moreover, the majority found that the extraterritorial scope of § 243(h) conforms to both the plain language and object and purpose of Article 33 of the Refugee Convention in applying to "all aliens, no matter where found." *Id.* at 35a. Finally, the majority held that neither statutory provisions empowering the President to regulate entry, nor the President's constitutional powers as commander-in-chief and the "sole organ" of the nation in its external affairs, authorize the executive to do what Congress expressly forbade him from doing when it exercised its plenary immigration power in enacting § 243(h). *Id.* at 35a-38a.

In accordance with the Second Circuit's decision, the district court entered a preliminary injunction prohibiting petitioners from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of political opinion. Pet. App. at

11(...continued)

now, Article 33 is a cruel hoax and not worth the paper
it is printed on. . . .

Pet. App. at 167a (footnote omitted).

¹²The majority held that three subgroups of the class of "screened-in" plaintiffs, plus plaintiffs who had been "screened-out" under the new interdiction program, had not been parties to the earlier action. Pet. App. at 8a.

¹³In a concurrence joined by Judge Pratt, Judge Newman agreed that the "absolute" "command of section 243(h)"—"the alien shall not be returned to face persecution"—"cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors." Pet. App. at 42a.

169a-170a. This Court stayed the lower courts' rulings pending final disposition of the Solicitor General's *certiorari* petition on August 1, 1992 and granted *certiorari* on October 5, 1992.

SUMMARY OF ARGUMENT

I. This is not a case about entry. It is about the right of Haitian aliens *not to be returned* to their homeland, where they fear political persecution. Before 1980, § 243(h)(1) of the INA, 8 U.S.C. § 1253(h)(1), "authorized" the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of . . . political opinion." (J.A. at 365). In 1980, Congress removed the geographical limitation "within the United States" and made its command mandatory, to conform with our binding treaty obligations under Article 33 of the Refugee Convention. Section 243(h) now directs that "[t]he Attorney General shall not deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of . . . political opinion." 8 U.S.C. §1253(h)(1), Pet. App. at 259a (emphasis added). On May 24, 1992, despite Congress' unambiguous mandate, petitioners began summarily and forcibly returning all interdicted Haitian aliens to Haiti, including *bona fide* refugees whose life or freedom would undeniably be threatened on account of their political opinion.

No government has ever before taken to the high seas to intercept fleeing refugees and return them, forcibly and without process, to their persecutors. In a careful and well-reasoned decision, the Second Circuit held that petitioners' unprecedented policy violates the plain language of § 243(h). That decision is correct and should be affirmed. The Second Circuit's decision simply enforced the unambiguous language and intent of both § 243(h) and the self-executing treaty provision that it embodies, Article 33 of the Refugee Convention. The text, structure and purpose, legislative history, negotiating history, and executive branch interpretation underlying the statute and treaty all confirm that § 243(h) applies to "any" Haitians interdicted on the high seas.

Petitioners now ask this Court to upset the Court of Appeals' decision, claiming that it interferes with sensitive military and foreign policy decisions. But ours is a foreign policy conducted

under law. Nothing in our immigration laws gives executive officials *carte blanche*, in the name of foreign policy, to respond to refugee flight by returning fleeing refugees to their persecutors. The Second Circuit's order does not require petitioners to admit any Haitians to this country; nor does it bar Haitians from sailing to third countries, from being brought to Guantanamo naval base, or even from being interdicted, so long as *bona fide* refugees are not returned.

II. Six of the seven judges who have considered petitioners' collateral estoppel claim have rejected it in five separate opinions, all noting that this case involves parties and circumstances different from those presented in the Eleventh Circuit's decision in *HRC*. Those rulings deserve substantial deference. First, respondents were not parties to *HRC*. All members of the *HRC* class had been "screened-out" and were interdicted pursuant to the United States Interdiction Program that was in effect when *HRC* was decided. Second, this case presents a pure question of law, thus rendering preclusion inappropriate as a matter of equity. Third, the Second Circuit properly denied estoppel based upon petitioners' representation to this Court when they successfully opposed *certiorari* months ago in *HRC*. Fourth, circumstances have dramatically changed as a result of petitioners' own conduct.

III. Nor is there any merit to petitioners' belated claims that the INA or the APA somehow immunize their lawless conduct from judicial review or exempt it from injunctive relief. Nonresident aliens located outside the United States qualify as "persons aggrieved by agency action" who are entitled to obtain review in U.S. courts of the legality of U.S. governmental acts under the APA. Section 702 of the APA creates a strong presumption favoring judicial review of final agency actions, and this Court has regularly reaffirmed that the presumption applies to the INS. Petitioners cannot demonstrate either an express or implied congressional intent to preclude review.

Similarly, nothing in 5 U.S.C. § 702 of the APA requires the district court to dismiss this action or to deny equitable relief. The text and legislative history of that provision demonstrate congressional intent not to alter the courts' traditional equitable discretion or to modify preexisting standards governing judicial review. No court has ever accepted petitioners' claim that this

provision acts, of its own force, as a limitation on equitable relief in immigration cases.

ARGUMENT

I. SECTION 243(H) OF THE INA BARS PETITIONERS FROM RETURNING "ANY ALIEN" TO A COUNTRY WHERE HER LIFE OR FREEDOM WOULD BE THREATENED

The laws of the United States, including § 243(h) of the INA, bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.¹⁴ The decision below rests on the simple logic that Congress meant what it said when it rewrote § 243(h) in 1980.

Petitioners would overturn the Second Circuit's opinion based not on the explicit words of the statute and treaty, but on an elaborate patchwork of inapposite presumptions, negative inferences, text from other statutory provisions, snippets of legislative and negotiating histories, and their own reinterpreted litigating positions. Pet. Br. at 27-55. The Second Circuit fully considered and correctly rejected each of petitioners' contentions.

¹⁴By holding that § 243(h) applied extraterritorially to bar petitioners' policy, the Second Circuit did not reach or decide the questions whether the Kennebunkport Order should also be invalidated under Article 33.1 of the Refugee Convention, the U.S.-Haiti Agreement, or on equal protection grounds. Pet. App. at 39a. This Court has repeatedly held that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Because these alternative grounds for affirmance are addressed thoroughly in the *Briefs Amici Curiae* of the Lawyers Committee for Human Rights (Article 33); the Association of the Bar of the City of New York (U.S.-Haiti Agreement); and the NAACP (equal protection), we do not address them here and incorporate those arguments by reference. Should the Court choose to reverse the Second Circuit's ruling regarding § 243(h), however, it should remand to the Second Circuit with instructions to consider these alternative grounds.

A. The Text of Section 243(h) and Article 33

1. Section 243(h)

Before 1980, § 243(h) provided:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

(Emphasis added).

The Refugee Act of 1980 explicitly amended this provision in three critical respects. Congress (1) deleted the words “within the United States”; (2) barred the government from “return[ing],” as well as “deport[ing],” alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions.¹⁵

Petitioners would have this Court read “return” to mean only “expel from the United States” and “any alien” to mean only “any alien within the United States.” By their reading, petitioners would restore by executive fiat precisely the language that Congress removed when it excised the words “within the United States.”¹⁶ Yet “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted).

¹⁵Section 243(h), now entitled “Withholding of Deportation Or Return,” reads:

The Attorney General shall not deport or return any alien [except those involved in Nazi war crimes] to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (emphasis added).

¹⁶As Judge Pratt noted, “[t]o accept the government’s reading of the statute, we would in effect be reading . . . words . . . back into § 243(h)(1). . . . which would counter Congress’s plainly expressed intent” to change those words in 1980. Pet. App. at 18a.

As the Second Circuit noted, the term “any alien” plainly encompasses Haitians interdicted on the high seas, who qualify as “any person[s] not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (emphasis added). Nor is there doubt that “the government’s interception and forcible repatriation of Haitian refugees constitutes a ‘return’ of those refugees to their persecutors in violation of § 243(h)(1).” Pet. App. at 21a. “Return” means return: “to bring, send, or put (a person or thing) back to or in a former position.” *Webster’s Third New International Dictionary* 1941 (1986), cited in Pet. App. at 22a. Congress specified that the Attorney General may not return—i.e., send back—an alien “to a country” where she would face persecution, without specifying where an alien may not be returned from—i.e., within or without the United States.

This Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981) (citations omitted). The statute’s plain language entirely proves our case.¹⁷

2. Article 33

Petitioners concede that the 1980 Refugee Act revised § 243(h) “to conform its language to Article 33” of the Refugee

¹⁷Despite petitioners’ claim, the *non-refoulement* obligations placed on Congress by Article 33, and by Congress on the Attorney General by § 243(h), bind the Coast Guard wherever it encounters potential refugees. All executive officers regulate immigration by virtue of delegations from Congress, particularly the Attorney General. See *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Petitioners claim 14 U.S.C. § 89 as a source of authority for the Coast Guard’s actions, Pet. Br. at 2, but never mention that section’s requirement that “officers of the Coast Guard . . . insofar as they are engaged in enforcing any law of the United States” shall “be deemed to be acting as agents of the particular executive department charged with administering that law and subject to that department’s rules and regulations.” 14 U.S.C. § 89(b) (1988).

Convention. Pet. Br. at 36.¹⁸ Nonetheless, they ask the Court to ignore § 243(h)'s core purpose: to embed into United States law our humanitarian international obligation not to deliver fleeing refugees into the hands of their persecutors.

Article 33 of the Refugee Convention states categorically that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” (emphasis added) on account of his political opinion.¹⁹ None of the key terms in this article—“refouler,” “refugee,” “in any manner whatsoever” or “to the frontiers of territories where his life or freedom would be threatened”—is in any sense ambiguous.²⁰

The ordinary meaning of the French word “refouler” is “return.” Like “return,” “refouler” connotes pushing or taking someone or something back to a place where he or it has previously been. The authoritative French dictionary, *Dictionnaire Larousse*, defines “refouler” as “to stem,” “to repulse,” or “[t]o drive back, repel.” *Dictionnaire Larousse* 631 (1981) (Français).

¹⁸The imperative language of [§ 243(h)] is not an accident. . . . [T]he nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *non-refoulement* obligations under Article 33.1 of the United Nations Convention Relating to the Status of Refugees [citations omitted].” *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

¹⁹Article 31 of the Vienna Convention on the Law of Treaties requires that treaties first be construed according to their “ordinary meaning.” 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), *entered into force* January 27, 1980. Petitioners accept the Vienna Convention as the prevailing authority in treaty interpretation. State Department Letter, Dec. 11, 1991 (J.A. at 412-13).

²⁰Like § 243(h), Article 33 carries no territorial limit. Both clauses focus exclusively on the *object* of the prohibited government action (“any alien” in § 243(h); “a refugee” in Art. 33), the *nature* of the act (“The Attorney General shall not *deport or return*” in § 243(h); no state shall “*expel or return*” in Art. 33) and the act’s *destination* (“to a country” of persecution, § 243(h); “to the frontiers of the territories” of persecution, Art. 33). Neither clause limits the location “from” which a refugee may not be returned. Thus, the explicit language indicates that the prohibition applies to “any alien,” wherever situated.

Anglais).²¹ Moreover, Article 33 uses the disjunctive word “or” to clarify the drafters’ intent to contrast “return (‘refouler’)”—connoting “to push back” or “repulse”—with “expel,” which Webster’s defines as “to force out from,” “eject” or “deport.”²² In French, the term “expel” is commonly translated not as “refouler,” but as “expulser,” *Larousse* (English French) at 241, which means ejecting someone from a place he has already entered, without suggesting where he should be ejected to. See *id.* at 314. For that reason, the French text of the Refugee Convention, which according to Article 46 is “equally authentic” as to its meaning, translates the operative phrase “no contracting State shall expel or return (‘refouler’)” as “Aucun des États Contractants n’expulsera ou ne refoulera.” Pet. App. at 29a.

Petitioners seek to equate “expel” and “return,” relying on a subsidiary meaning of “refouler” listed in a nonauthoritative French dictionary. Pet. Br. at 39 (citing *Cassell’s French Dictionary*).²³ But “refouler” does not connote ejection of an alien from within the territory of a Contracting State. As the Second Circuit noted, “the government’s strained reading of Article 33.1 would forbid a state to ‘expel or expel’ an alien.” Pet. App. at 29a, an absurdly redundant reading that would deny independent meaning to each word of the phrase “expel or return (‘refouler’).” In refugee law, “*non-refoulement*” has become a well-recognized term of art that describes the absolute right of non-return that refugees acquire as

²¹When the meaning of French terms in a treaty is an issue, the Supreme Court has “relied on . . . French dictionaries as a primary method for defining terms. . . .” *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1494 (1991). *Dictionnaire Larousse* has been used as the authoritative French dictionary in this Court for more than a century. See, e.g., *Floyd*, 111 S. Ct. at 1494 (using *Larousse* to interpret the meaning of “*lésion corporelle*” in Article 17 of the Warsaw Convention); *Air France v. Saks*, 470 U.S. 392, 400 (1985) (using *Larousse* to define the term “accident” in Article 17 of the Warsaw Convention).

²²*Webster’s Third New International Dictionary* 799 (1986). “Expel” is also defined as “dislodge,” “to drive away from a place or country; compel to leave; deport,” “drive out; cast out. . . .” *Id.*

²³A computer-assisted search reveals that *Cassell’s French Dictionary*, unlike *Dictionnaire Larousse*, has never been cited in a single Supreme Court case.

soon as they escape their homelands, regardless of whether they have also entered into another country.²⁴

Equally unambiguous are the other words of Article 33. The Refugee Convention defines a "refugee" as one who "owing to a well-founded fear of" political persecution "is outside the country of his nationality," whether or not she is also inside another state. Art. I(2). Similarly, the phrase "in any manner whatsoever" admits of no exceptions and clearly embraces stopping Haitian vessels on the high seas. Finally, the prepositional phrase "*to the frontiers* of territories where his life or freedom would be threatened" says nothing about the location *from* which the refugee is to be returned.

B. The Structure and Purpose of § 243(h) and Article 33

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

1. Section 243(h) as Part of the Refugee Act of 1980

The Refugee Act of 1980, "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress,"²⁵ firmly committed the United States to a legal regime of comprehensive protection and treatment of refugees and asylum policy "to bring United States refugee law into conformance with the 1967 United Nations Protocol." *INS v. Cardoza-Fonseca*, 480

U.S. 421, 436-37 (1987).²⁶ The Refugee Act amended the INA to incorporate a three-part scheme of refugee protection:²⁷ (1) § 207, 8 U.S.C. § 1157, an overseas refugee processing procedure made available outside the United States to those in their homelands or in third countries; (2) § 208, 8 U.S.C. § 1158, a statutory right to apply for political asylum, made available to those aliens "physically present in the United States or at a land border or port of entry, irrespective of such alien's status"; and (3) a modified § 243(h), 8 U.S.C. § 1253(h), the statutory *non-refoulement* provision, made available to "any alien" without geographic limitation, under strengthened language that codified our mandatory treaty obligation under Article 33 of the Refugee Convention.

These amendments provided overlapping, not alternative, protections to refugees. In § 243(h), Congress recognized that any alien who flees has a right of *non-return* to his persecutors as soon as he clears his country's territorial borders, without regard to whether he ever applies for entry and asylum in this country. Unlike §§ 207 and 208, however, which were designed as statutory vehicles whereby aliens could gain lawful admission into the United States, § 243(h) was designed solely to prevent aliens from being returned to their persecutors.²⁸

Moreover, the 1980 statutory revisions enabled an alien to assert her refugee status in at least four different ways: (1) if physically present in the United States or at a port or land border, by an *affirmative asylum application* made to the INS under § 208;

²⁴Ordinary usage, as reflected in French newspapers, confirms that "*refouler*" describes petitioners' actions against respondent Haitian refugees. See, e.g., Jean-Michel Caroit, *L'exode continue*, Le Monde, May 29, 1992, at 4 ("La décision du président Bush d'ordonner à la garde côtière américaine de *refouler* les boat-people haïtiens vers leur île pour tenter de mettre fin à un véritable exode a suscité." (President Bush's decision to order the U.S. Coast Guard to *return* the Haitian boat people to their island was an attempt to put an end to a genuine exodus.)) (emphasis added); *Le bourbier haïtien*, Le Monde, June 1, 1992 ("Les États-Unis ont décidé de *refouler* directement les réfugiés recueillis par la garde côtière .") (The United States has decided to directly *return* the refugees picked up by the Coast Guard)) (emphasis added).

²⁵126 Cong. Rec. 4501 (1980) (remarks of Rep. Peter Rodino).

²⁶See also *INS v. Stevic*, 467 U.S. 407, 421 (1984) ("[s]ection 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol"); *id.* at 418 ("there is no substantial difference in coverage of § 243(h) and Article 33") (citation omitted) (emphasis added); *INS v. Cardoza-Fonseca*, 480 U.S. at 429, 440; *INS v. Doherty*, 112 S. Ct. at 729 (Scalia, J., concurring in the judgment in part and dissenting in part).

²⁷See generally Sponsors' Brief (recalling goals of framers of the Refugee Act).

²⁸As the Sponsors' Brief makes clear, until now, no one ever suggested that any person or group could be denied the protections of § 243(h) simply because the option of § 207 processing allegedly remains available in their embattled homeland. Such an argument would mean that the Attorney General could do away with two statutory rights so long as he does not totally destroy the third.

(2) if he has entered the U.S., upon a request to an immigration judge for asylum and withholding of deportation under §§ 208 and 243(h) in a *deportation* proceeding conducted under Part V of the INA ("Deportation; Adjustment of Status"); (3) if he has not entered the U.S., upon a request made to an immigration judge for asylum and withholding of deportation under §§ 208 and 243(h) in an *exclusion* proceeding conducted under Part IV of the INA ("Provisions Relating to Entry and Exclusion") and (4) if he is outside the U.S., in a § 207 proceeding conducted overseas without judicial review.

Petitioners claim first, that § 243(h)'s location in Part V of the INA ("Deportation; Adjustment of Status") somehow limits its applicability to aliens in deportation proceedings, concluding that the word "return" must mean "deport from within the United States." Pet. Br. at 35-36. But Congress originally placed § 243(h) in Part V of the INA at a time when it governed *only* withholding of deportation, and thus applied only to those aliens located within the United States who were subject to deportation. The Second Circuit found that after Congress expanded § 243(h) to bar forced return as well as deportation, this location was a historical relic of no significance. Pet. App. at 19a-21a. Indeed, if § 243(h)'s location in Part V were meaningful, its applicability would be limited solely to deportation proceedings and could not act, as it undeniably does, to protect aliens in exclusion proceedings under Part IV.

Second, as petitioners concede, when Congress amended § 243(h) in 1980, it added the § 208 asylum provision and specifically limited it to aliens "physically present in the United States." Pet. Br. at 30. Simultaneously Congress *deleted* almost identical words upon amending § 243(h). Congress's simultaneous enactment of territorially limiting language in § 208 and the deletion of similar language in § 243(h) presumptively demonstrates that the deletion was intentional and purposeful. *Cardoza-Fonseca*, 480 U.S. at 421 (citations omitted).

Section 208's territorial language also debunks petitioners' speculative claim that "if Congress wanted to extend the benefits of [§ 243(h)] to aliens in exclusion proceedings, the most logical way to accomplish that result was to delete the phrase. . . . 'within the United States'" Pet. Br. at 52. To the contrary, if Congress wanted to extend the benefits of § 243(h) only to aliens

in exclusion proceedings the most logical way was to add the words "physically present within the United States" to § 243(h), just as it did to § 208 and many other sections of the INA.²⁹

Petitioner's argument also ignores that other provisions of the INA carefully employ the term "deport" to encompass both deportation *and* exclusion proceedings. See, e.g., 8 U.S.C. §§ 1225(c), 1227(a)(1). Thus, the word "return" acquires meaning only if it applies, as the Second Circuit held and as the plain reading compels, to aliens *outside* the territorial limits of the United States.³⁰

Petitioners claim that the addition of the "exceptions" clause, § 243(h)(2)(c), denying withholding of deportation or return to any alien who has committed a serious nonpolitical crime "prior to [her] arrival. . . in the United States," 8 U.S.C. § 1253(h)(2)(c), must mean that the non-return clause, § 243(h)(1), also applies only to aliens who have arrived in the United States. Pet. Br. at 34. But even if accompanying subsections do contain genuine limits, they cannot be read into other subsections that do not explicitly contain that limit. Congress's understandable decision to permit the deportation of criminal aliens who have entered U.S. territory hardly suggests its intent to permit the apprehension and return of noncriminal aliens who have not entered, and may have no desire

²⁹See, e.g., 8 U.S.C. §§ 1158(a) (asylum coverage), 1159 (adjustment of refugee status), 1101(a)(27)(I) (defining "special immigrant" for visa purposes), 1254(a)(1)-(2) (eligibility for suspension of deportation), 1401(d),(e),(g) (requirements for nationality and citizenship at birth), 1408(4) (requirements for nationality but not citizenship at birth), 1409(c) (requirements for nationality status for children born out of wedlock), 1430(a)(1) (requirements for naturalization - married persons), 1503(b) (requirement for appeal of denial of nationality status) (1988); 8 U.S.C.A. §§ 1182(E) (exception under excludability of smugglers), 1251(a)(1)(E)(ii) (exception from general classes of deportable aliens), 1254a(c)(1)(A)(i), (c)(3)(B) (requirements for temporary protected status), 1255a(a)(3) (requirements for temporary resident status) (West Supp. 1992).

³⁰Petitioners make much of the fact that § 207 processing applies to aliens outside the United States, but they point to no language in that section specifically extending it extraterritorially. Pet. Br. at 31. Given this concession, petitioners cannot explain why § 243(h), which similarly contains no such limitation and specifically dropped the words "within the United States," should be construed to require an alien's *presence* in the United States.

ever to enter, United States territory. Although Congress clearly knew how to limit the geographical reach of *part* of § 243(h) to aliens who had arrived in the United States, it consciously removed a parallel territorial limit in another part of the same provision. Given that “a change in language [must] be read, if possible, to have some effect,” the removal must be understood as a conscious decision to extend § 243(h)(1)’s territorial applicability. Pet. App. at 18a-19a.

2. The Structure of Article 33 Within the Refugee Convention

Article 31 of the Vienna Convention on the Law of Treaties requires that treaties first be construed according not only to their “ordinary meaning” but also “in light of their object and purpose.” The Refugee Convention was one of a wave of international human rights treaties originally drafted in response to the flight of millions of people during and after World War II. The Convention’s purpose was to extend international protection to individuals who, having fled persecution in their own country, could no longer invoke that government’s legal protection. One goal of the Refugee Convention was to accord economic and social benefits to refugees already lawfully admitted to a country, thereby affording such refugees the opportunities granted to other immigrants. For this reason, various chapters address the rights of refugees lawfully in a state’s territory to juridical status (Ch. II), gainful employment (Ch. III), welfare (Ch. IV), and the like. None of these territorial references was intended, however, to bar the application of other provisions of the Refugee Convention to the high seas.

This is particularly true with respect to the negative prohibition of Article 33 of the Refugee Convention, one of the very few provisions that does not concern economic and social rights.³¹ Article 33 expressly limits the freedom of a contracting state to expel or return *bona fide* refugees to their countries of persecution, wherever they may be found. The Convention’s

³¹Only three provisions speak strongly of negative prohibitions: art. 31.1, which bars imposition of penalties on refugees unlawfully in country of refuge if they come directly from a territory of persecution; art. 32.1, which bars expulsion of refugees lawfully in the territory except to preserve national security or public order, and the *non-refoulement* provision, art. 33.

drafters considered *non-refoulement* so important that originally no exceptions to the text of Article 33 were allowed.³² To date, no nation has entered an exception or reservation to its Article 33 obligations. Numerous international publicists now conclude that the principle of *non-refoulement* has achieved the status of *jus cogens*, together with the prohibition against state-sponsored assassination and torture, and therefore is binding on nations regardless of any formal accession to it.³³ By removing time and geographic limitations under the 1951 Convention, the 1967 Protocol made clear the drafters’ intent to universalize the principle of *non-refoulement*.

The origins and purpose of the Refugee Convention reveal that petitioners’ core claim—that a contracting state’s obligation under Article 33 of the Convention not to return refugees to their country of persecution somehow dissolves at its borders—turns the intent of the Convention’s drafters on its head. See Affidavit of Louis Henkin (“Henkin Aff.”), Appendix A.³⁴ A contracting state may no more commit *refoulement* on the high seas than it may commit torture or genocide there. As Judge Newman found, both § 243(h)

³²Goodwin-Gill, *The Refugee in International Law* 72 (1983). Eventually, two narrow exceptions in subsection 33(2) were added, relieving states of Article 33(1)’s obligations for aliens who had been convicted of serious crimes or “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is.” Art. 33(2). As with § 243(h), petitioners try unsuccessfully to read territorial language in an exception back into the general rule. Pet. Br. at 40-41.

³³See Report of U.N. High Commissioner for Refugees, 40 U.N. GAOR Supp. (No. 12) at 6, U.N. Doc. A/40/12 (1985) (“*non-refoulement* has now come to be characterized as a peremptory norm of international law.”); Cartegena Declaration on Refugees (Geneva, UNHCR 1984) conclusion 5 (“[*Non-refoulement*] is imperative in regard to refugees . . . as a rule of *jus cogens*.”) “Jus Cogens,” 12 *Hastings Int'l. & Comp. L. Rev.* 436 (1989) (“right of *non-refoulement*, like all *jus cogens* norms, exists outside of treaties, and is non-derogable, binding, and judicially enforceable.”).

³⁴While working at the State Department, Professor Henkin served as the United States’ Representative to the First Session of the United Nations *Ad Hoc Committee on Statelessness and Related Problems*, in January to February, 1950. That committee drafted the Refugee Convention. As someone who was present at, and participated in, all of the meetings held during the Session, Professor Henkin speaks authoritatively about the intent of the drafters of the Convention, and the intent of the U.S. government. A sworn and signed original of his affidavit is filed with the Clerk of the Court.

and Article 33 “forbi[d] our country from laying hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution.” Pet. App. at 42a (Newman, J., with whom Pratt, J. joins, concurring).

“*Refouler*” is a term of art, but one that is not limited to a state’s territory. In contrast to Article 32, which states that “Contracting States shall not *expel a refugee lawfully in their territory* save on grounds of national security or public order,” Article 33 serves as the central protection accorded to a refugee *not* lawfully admitted to a contracting state, namely, the right not to be *expelled or returned to a territory* where her life or freedom would be threatened. See Henkin Aff. ¶ 8. By not limiting Article 33’s applicability to refugees admitted to a contracting state, the drafters were intentionally choosing to apply Article 33’s “*non-refoulement*” requirement to refugees who are outside the territorial borders of a contracting state. *Id.* ¶ 7. Thus, petitioners simply err when they claim that our interpretation of “return (*refouler*)” somehow renders the references to “expel” in Articles 32 and 33 superfluous. Pet. Br. at 39-40.

Moreover, petitioners prove nothing by pointing to express territorial limitations of other articles of the Convention. Pet. Br. at 41. Far from proving that Article 33 is similarly limited, they only show that the contracting states knew how to restrict a provision’s territorial reach when they wanted, but imposed no such limit in Article 33. Likewise, petitioners’ claim that Article 40 of the Convention—which permits a contracting state to declare at the time of signature to which of its territories the Convention shall extend—somehow restricts Article 33’s geographical application to U.S. territory is also baseless. Pet. Br. at 41, 42 n.29. Article 40 is a “colonial clause,” well-known in international law, which governs not the territorial application of the convention but who its signatories are.³⁵ The United States has never filed any declarations of territorial limitation under this provision.³⁶

³⁵See L. McNair, *The Law of Treaties* 118-19 (1961).

³⁶See Defendant’s Brief at 43 n.28, *HCC II* (“We have been informed by the Department of State that the United States has not filed any territorial declarations under Article 40. However, the Department regards the Convention as applicable (through the Protocol) to all territories for which the United

(continued...)

In sum, there is simply “no basis for th[e] view” expressed in Pet. Br. at 36 and § 2 of the Kennebunkport Order that the terms of Article 33 “do not extend to persons located outside the territory of the United States.” Henkin Aff. ¶ 3. Petitioners ask this Court to forget that the Refugee Convention and the 1980 Refugee Act were drafted to aid, not shun, fleeing refugees. The Convention was triggered by the Second World War, primarily in response to the tragic experience of Jewish refugees during that period. If petitioners’ reading is correct, and history repeated itself, the United States could escape its obligations under Article 33 simply by dispatching the Coast Guard to the high seas, apprehending fleeing Jews *before* they reached our waters, and deliberately returning them to their Nazi persecutors. This cannot be the law.³⁷

C. Secondary Evidence

Unsupported by the text, structure, or purpose of the laws they cite, petitioners turn to secondary materials, selectively citing excerpts from the legislative history of § 243(h), the negotiating history of Article 33, and self-serving executive branch interpretations. Pet. Br. at 36-51. The clarity of both the statutory language and the treaty language it incorporates entirely forecloses petitioners’ resort to the legislative and negotiating histories of

³⁶(...continued)

States is responsible for the conduct of foreign relations, including the Panama Canal Zone, Puerto Rico, the Virgin Islands, Guam, and American Samoa.”)

³⁷See Henkin Aff. ¶¶ 5-6. The St. Louis, a vessel carrying Jews fleeing Nazi Germany was turned away from New York Harbor to Germany’s gas chambers. See Gordon Thomas & Max Morgan Witts, *Voyage of the Damned* (1974). Indeed, if President Aristide himself were currently en route to the United States by boat, petitioners’ reading of the law would permit them to interdict him and return him to the hands of the Haitian military regime without ever inquiring about his fears of political persecution or ever making the determination required by § 243(h).

those instruments.³⁸ Nonetheless, examination of these sources supports the Second Circuit's decision.³⁹

1. Legislative History of § 243(h)

Congress revised § 243(h) in 1980 to conform its language to Article 33, and the two provisions therefore have "parallel" territorial scope. Pet. Br. at 36, 52.⁴⁰ Both apply when the Attorney General or his agents attempt to return aliens interdicted on the high seas. Petitioners repeatedly claim that our position would render § 243(h) "world-wide" in scope. Pet. Br. at 51, 52, 55. In fact, we assert only that when, as here, the Attorney General and his agents take to the high seas to intercept fleeing refugees, the obligations under § 243(h) and Article 33 not to return those refugees to their country of persecution travel with such officials.

Petitioners offer the wholly speculative hypothesis that Congress added the words "or return" to § 243(h) and deleted the reference to any alien "within the United States," to extend § 243(h)'s benefits narrowly to excludable aliens who are physically inside but legally still outside the United States, thereby mitigating this Court's holding in *Leng May Ma v. Barber*, 357 U.S. 185 (1958). Pet. Br. at 52-54.⁴¹ *Leng May Ma* held that excludable

³⁸When a statute's language is unambiguous, the courts must presume that the legislature meant what it said. Cf. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (ruling only on plain language and refusing to examine the legislative history); *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties.'").

³⁹See Briefs Amici Curiae Sponsors' Brief (reviewing legislative history of § 243(h)); UNHCR; Association of the Bar of the City of New York (reviewing customary law and state practice); Former Attorneys General (challenging petitioners' statutory and treaty interpretation); and Henkin Affidavit (reviewing negotiating history of Art. 33).

⁴⁰All available legislative history of the Refugee Act settles that § 243(h) has the same scope and force as Article 33. See H.R. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979); *U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 14 (1980).

⁴¹Petitioners twice cite stray language regarding territoriality in the 1979 House Report. H.R. Rep. No. 608, *supra*, at 17; Pet. Br. at 47, 52. They never
(continued...)

aliens paroled into the U.S. may not claim § 243(h) relief. Pet. Br. at 52-53.⁴² The problem with the hypothesis is that Congress nowhere mentions *Leng May Ma* in the entire legislative history of the Refugee Act. Nor do petitioners offer any explanation why it took Congress twenty-two years to repair the statute to "correct" *Leng May Ma*, or why Congress did not simply substitute other limiting language for "within the United States" rather than removing the geographic limit altogether.⁴³

2. Negotiation and Ratification History of Article 33

Similarly, petitioners rely on a strained reading of the statements of two foreign delegates—statements that were never

⁴¹(..continued)

mention that that language referred both to asylum (which was admittedly territorial) as well as to withholding of deportation and exclusion, and was not repeated in the Conference Report on the 1980 Refugee Act, which adopted the House provision "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Rep. No. 781 at 20 (emphasis added).

⁴²Petitioners seek to buttress this point by citing testimony from the 1977 and 1979 bills, particularly by Amnesty International. Pet. Br. at 53 n.42. These hearings have little bearing on the matter before us, for both the 1977 and 1979 bills would have amended § 243(h) to give the Attorney General more discretion than he has under the current provision. See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 12 (1977); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 14-15 (1979). The provision finally enacted was mandatory, not discretionary. Even assuming *arguendo* that petitioners' treatment of interdicted Haitians comports with the rejected 1977 and 1979 bills, that does not establish compliance with the higher standards of the 1980 Act as actually passed. Moreover, the legislative history clearly establishes that the House bill was amended following testimony from Amnesty International which advocated that the bill be amended to conform fully with Article 33.

⁴³See *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 (1991) (if Congress intended to change statutory coverage upon amendment, it "would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history . . ."). Moreover, as the Sponsors' Brief points out, even if § 243(h) is limited to persons in the circumstances of *Leng May Ma*, the Haitian refugees here are within its scope. See Sponsor's Brief.

commented or voted upon by the United States and never presented to or considered by the Senate during the 1968 ratification of the U.N. Protocol—as somehow indicative of a U.S. intent to limit Article 33's application to its own territory.⁴⁴ Pet. Br. at 42-44. Once again, the Second Circuit correctly rejected this claim. Pet. App. at 23a-35a.

In treaty interpretation, reliance on the treaty's negotiating history (*travaux préparatoires*) is an alternative of last, not first, resort. Vienna Convention on the Law of Treaties, Art. 32, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 692 (1969), *entered into force*, Jan. 27, 1980 (J.A. at 413).⁴⁵ A treaty's plain language therefore must control unless there is "extraordinarily strong contrary evidence." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

Petitioners cite a snippet of a massive negotiating record without re-examining the object and purpose of the Convention. As explained above, the core concern of the drafters of the Convention was to create broad protections for Europe's new populations of refugees, including an absolute right of *non-refoulement* in Article 33. The drafters thus limited Article 33 to make clear that it did not compel states to *admit* refugees, even while it unequivocally protected refugees from *refoulement* or return to territories where they feared persecution.⁴⁶

⁴⁴Petitioners isolate comments by two foreign delegates made during the 1951 Conference of Plenipotentiaries to make the sweeping claim that "the word 'refoulér' in paragraph 1 of Article 33 can only be understood to embody a deliberate decision by the Contracting States (including the United States) to incorporate the territorial limitation we urge into the text of the Convention." Pet. Br. at 43.

⁴⁵Article 31 instructs courts to rely primarily on a treaty's language and purpose. The negotiating history of a treaty can be used in treaty construction only as a last resort, and even then only if a plain language analysis "leaves the meaning ambiguous or obscure" or leads to a "manifestly absurd or unreasonable result."

⁴⁶See Refugee Convention, Preamble:
The High Contracting Parties

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which
(continued...)

When this point arose before the drafting committee in February 1950, the United States delegate, Louis Henkin (then a State Department official) recognized that the Committee had rejected a chapter requiring the granting of *admission* to refugees, but stated

It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, . . . the problem was more or less the same. *Whatever the case might be . . . he must not be turned back to a country where his life or freedom would be threatened. No consideration of public order should be allowed to overrule that guarantee*, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

Summary Record of the Twentieth Meeting, Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/SR.20, at 11-12 (Feb. 1, 1950) (emphasis added).

When the Conference of Plenipotentiaries met the following year to adopt Article 33, the Swiss and Dutch delegates reiterated their concern about preventing mass migrations *into* their countries. The Dutch delegate wanted agreement, on the record, "that the possibility of mass migrations *across frontiers*, or of attempted mass migrations was not covered by article 33." A/CONF.2/SR.35 at 21 (emphasis added). He was not expressing an intent to promote forced extraterritorial repatriations of mass migrations *before* they reached his country's frontiers. Rather, he was making it clear that if large numbers of refugees appeared at the borders of his country, the non-return mandate of Article 33 would not obligate the Netherlands to let all of the refugees in ("across frontiers").

⁴⁶(...continued)

the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

This is not to suggest that “*refouler*” means “expel” or that Article 33 does not apply extraterritorially.⁴⁷ Significantly, what the Dutch delegate had placed on the record was not the Swiss representative’s definition of the word “*refouler*” but “that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.” This interpretation remains true today. This is not a case about entry or asylum, but non-return.⁴⁸ Respondents have never claimed that the Attorney General is obliged to *admit* a mass Haitian migration across our frontiers or borders, only that Article 33 and § 243(h) bar the Attorney General from *returning* all arriving ships to Haiti.

Even then, apart from the Swiss and Dutch speakers, only four others of the twenty-six states represented at the provision’s drafting voiced actual support for the Swiss and Dutch position, not surprisingly, the European countries of Belgium, Federal Republic

⁴⁷To the contrary, immediately after the President placed the Dutch delegate’s statement on the record,

Mr. HOARE (United Kingdom) remarked that the Style Committee had considered that the word “return” was the nearest equivalent in English to the French term “*refoulement*.” He assumed that the word “return” as used in the English text had no wider meaning.

The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word “*refoulement*” (“*refouler*” in verbal uses) should be included in brackets and between inverted commas after the English word “return” wherever the latter occurred in the text. He further suggested that the French text of paragraph 1 should refer to refugees in the singular.

The two suggestions made by the President were adopted unanimously.
A/CONF.2/SR.35 at 21-22 (emphasis in original).

48For that reason, petitioners prove nothing when they describe the negotiating histories of the non-binding Declaration on Territorial Asylum and a Draft Convention on Territorial Asylum. Pet. Br. at 47-48. Both instruments were considered after the Protocol was adopted. That contracting states continued to resist a mandatory obligation of asylum in no way proves that they assumed a territorial limit on the Refugee Convention’s mandatory duty of non-return.

of Germany, Italy, and Sweden.⁴⁹ The President of the Conference then ruled that the Swiss and Dutch interpretation be placed on the record—a record that contains thousands of pages of written material—not that the entire Conference agreed with that statement Pet. App. at 34a.⁵⁰ Even assuming *arguendo* that the Dutch and Swiss views represented the views of the entire Conference of Plenipotentiaries, they are in no way inconsistent with the U.S. government’s position at the time.

The crucial point, as now-Professor Henkin attests, is that

[N]o government sought to reserve the right to reach out beyond its borders, seize potential refugees, and return them into the hands of their oppressors. By expressing a caveat about mass migrations, the delegates were confirming that the right of *non-refoulement* attached to individual refugees and not to groups. *They were not limiting the territorial reach of Article 33.*

Henkin Aff. ¶ 7. The position of the drafters regarding the territorial reach of Article 33 remained precisely that of Mr. Henkin the previous year: even if a country has no obligation under Article 33 to accept mass migrations for admission or asylum, “[w]hatever the case might be . . . [the refugee] must not be turned back to a country where his life or freedom could be threatened.” U.N. Doc. E/AC.32/SR.20 at 11-12.

Mr. Henkin’s views, and not those of the Dutch and Swiss delegates, represented the official position of the United States government. The United States delegate at the Conference of Plenipotentiaries the following year, Mr. George Warren, “took no action to rescind [Mr. Henkin’s] interpretation or to support any other interpretation,” Henkin Aff. ¶ 9, and hence the Henkin statement “continued as the official position of the United States

⁴⁹At least three of these, the Netherlands, Belgium, and Switzerland, now include in their domestic laws prohibitions *against* rejection at the frontier. See generally examples cited in *Brief Amicus Curiae* of Association of the Bar of the City of New York, pt. II.

⁵⁰By contrast, formal amendments to the Convention’s provisions were either “agreed” to or “adopted unanimously,” as was Mr. Hoare’s proposal regarding placing the word “*refouler*” alongside the word “*return*.” A/Conf.2/SR.35 at 22.

government with regard to the meaning of Article 33." *Id.* Nor is there evidence that the Dutch and Swiss delegates' views were ever communicated to the Senate as the official position of the drafters when it gave its advice and consent to ratification of the Protocol in 1968.⁵¹

In sum, petitioners have not produced any contrary evidence to challenge the conclusion that Article 33 bars their actions against Haitians interdicted on the high seas, much less the "extraordinarily strong contrary evidence" necessary to overcome the plain language of Article 33. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).⁵²

⁵¹See *Arizona v. California*, 292 U.S. 341, 360 (1934) (rule of treaty interpretation permitting reference to *travaux* "has no application to oral statements made by those engaged in negotiating the treaty which were not . . . communicated to the government of the negotiator or to its ratifying body"). The U.S. ratification history of the Protocol, recounted in Pet. Br. at 45-47, lends no support to petitioners' claim. Petitioners observe that the U.S. became a party to the Protocol in 1968, understanding that our existing immigration laws already provided the protections that Article 33 required, and that at that time, § 243(h) applied only to aliens "within the United States." But this hardly proves that Article 33's territorial scope automatically shrunk to match § 243(h)'s. To the contrary, the Attorney General was expected to exercise his statutory discretion in a fashion compatible with the "more generous" interpretation provided in the Protocol. *INS v. Stevic*, 467 U.S. 407, 429 n.22 (1983). Thus, between 1968 and 1980, the Attorney General never took to the high seas to repatriate fleeing refugees, because he used his statutory discretion to "honor[] the dictates of the United Nations Convention." *Id.* The fact that the President's Letter of Transmittal to the Senate, Pet. Br. at 45, mentions that "most refugees in this country" already enjoy most of the Convention's benefits, which are largely economic and social, hardly proves that the negative prohibition in Article 33 is territorially limited. By contrast, the Secretary of State's letter, reproduced in Pet. Br. at 45, describes the Protocol as guaranteeing the Article 33 prohibition to "refugees" without making any mention of their location.

⁵²The commentators cited in Pet. Br. at 44, n.32 all address the reluctance of states to enter into obligations to grant *admission* to, as opposed to *non-return* of, refugees. None of the commentators address, much less support, the legality of forced, summary, extraterritorial return. Petitioners claim support from leading commentators (including the former U.N. High Commissioner for Refugees), but never mention that the *current* U.N. High Commissioner, whose refugee handbook this Court has recognized "provides significant guidance in construing the Protocol," *INS v. Cardoza-Fonseca*, 480 (continued...)

3. Executive Branch Interpretation

Finally, petitioners claim that the Executive Branch has consistently interpreted Article 33 as they now propose. Pet. Br. at 49-50. In fact, prior to the issuance of the Kennebunkport Order in May, 1992, every legal instrument governing Haitian interdiction mandated that the U.S. government, in intercepting and returning Haitians on the high seas, strictly observe the principle of non-return. When the Haitian interdiction began in 1981, the Justice Department's own Office of Legal Counsel found that the U.N. Protocol required that the interdiction program observe the rights of refugees in international waters.⁵³

The 1981 U.S. agreement with Haiti that authorized interdiction cited "the international obligation mandated in the Protocol" and promised that the U.S. did not intend to return "any Haitian migrants whom the United States authorities determine to qualify for refugee status" (emphasis added). ("U.S.-Haiti Agreement") (J.A. at 382). Executive Order 12,324 affirmed this obligation by requiring that the INS and Coast Guard take whatever steps necessary to guarantee "the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland," § 3, and to ensure that "no person who is a refugee will be returned without his consent", § 2(c)(3) (emphasis added). Pet. App. at 265a. The INS Guidelines issued pursuant to Executive Order 12,324 further mandated that INS personnel be constantly watchful "for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol." INS Role In and Guidelines For Interdiction at Sea, October 6, 1981 (emphasis added). All the above legal instruments applied exclusively to the interdiction of Haitians on the high seas.

⁵²(...continued)

U.S. at 439 n.22, has filed a Brief *Amicus Curiae* in support of respondents' interpretation of Article 33.

⁵³ 5 Op. Off. Legal Counsel 242, 248 (1981) (J.A. at 316-17). ("Individuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims" (emphasis added).

Petitioners continued to acknowledge that Article 33 governed the interdiction program in testimony before Congress.⁵⁴ However, as petitioners acknowledge, Pet. Br. at 50, n.40, the government changed its interpretation when sued over its interdiction policy toward Haitians in *HRC v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987). Until then, petitioners concede, both OLC and "some State Department personnel" simply "assumed" the "premise that Article 33 applied on the high seas." Pet. Br. at 50, n.40, a logical assumption given the clarity of the treaty language involved. Around that time, petitioners unearthed the inconclusive statements of two foreign delegates in the *travaux*, the interpretive tool of last resort, in the course of defending *Gracey*. The State Department then persisted in its reinterpretation of the treaty, first to buttress the executive's repeated failures to win congressional approval for the Haitian interdiction program,⁵⁵ and later to thwart other pending litigation.⁵⁶ This history simply confirms the Court of Appeals' conclusion that the government's second interpretation "was 'the sort of *post hoc* litigation posture that is entitled to no deference.'"

⁵⁴In 1981, Acting Commissioner of the INS Doris Meissner testified that in interviewing interdicted Haitians, "[t]he INS officer's responsibility on the ship is to insure that we are in compliance with the U.N. protocol. . . ." *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 21-22 (1981) (emphasis added). The same point was made in 1989, by James Buck, Deputy Commissioner of the INS. He testified that in administering the interdiction program, the INS had "strictly observ[ed] our international obligations concerning those who are genuinely fleeing persecution in their homeland." *Haitian Detention and Interdiction: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 28 (1989).

⁵⁵See, e.g., *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., 36-43 (1989) (Statement of Alan J. Kreczko, Deputy Legal Adviser, Department of State).

⁵⁶See D.E. 148, Department of State Letter from Edwin D. Williamson to Timothy Flanigan re: *Haitian Refugee Center Inc. v. Baker*, Dec. 11, 1991 (J.A. at 202-16) (arguing against extraterritorial application in light of *HRC* litigation).

Pet. App. at 31a, citing *Lewis v. Grinker*, 965 F.2d 1206, 1220 (2d Cir. 1992).⁵⁷

Although petitioners now urge uncritical judicial deference to their expedient reinterpretation, *post hoc* executive-branch treaty analysis, proffered more than twenty years after ratification by an administration facing litigation, is highly suspect. This Court has given little credence to a party's argument where it constitutes "no more than statements of a litigating position." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693 (1976). Nor have courts ever blindly deferred to executive treaty interpretations when the executive's position contradicts original intent or earlier executive treaty interpretations.⁵⁸

⁵⁷Indeed, Senate testimony by petitioner Eagleburger two months after the Kennebunkport order called into question whether petitioners themselves fully understood the new legal rationale:

SEN. DeCONCINI: Mr. Eagleburger, what's the rationale for the President's May 24th executive order dealing with the Haitians, to return them without any interview by the INS? I'm told the answer is that they're not on U.S. territory so, therefore, they're not entitled to an interview. Is that all there is to it?

MR. EAGLEBURGER: No —

SEN. DeCONCINI: Had they gotten to Guantanamo or had they gotten to Key Biscayne then they would be entitled to an interview?

MR. EAGLEBURGER: No, no. Senator, this is more complicated than that. But the rationale for the President's decision and executive order in May was that we—it is not the issue that you raise. . . [I]t was not the issue of where they were or whether they would be interviewed, it was simply a question of stopping the outflow at that particular time.

Hearing of the Senate Judiciary Committee on U.S. Refugee Programs for FY 1993, 102d Cong., 2d Sess. (July 23, 1992) (LEXIS) (emphasis added).

⁵⁸See *W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 408-409 (1990) (rejecting position urged by State Department); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989) (rejecting Department's interpretation of Warsaw Convention); *Perkins v. Elg*, 307 U.S. 325 (1939) (refusing to defer to altered executive branch policy in construing bilateral naturalization treaty); *Johnson v. Browne*, 205 U.S. 309 (1907) (rejecting executive's interpretation of extradition treaty).

D. Canons of Statutory Construction

In the end, petitioners are left only with a canon of statutory construction—the “presumption against extraterritoriality”—to support their effort to narrow the plain language of § 243(h) and Article 33. But as the Second Circuit properly concluded, the duty to construe statutes harmoniously so as to save them from infirmity under international law, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), effectively forecloses the statutory interpretation petitioners urge.

1. The Presumption Against Extraterritoriality

Petitioners’ misplaced reliance on the so-called presumption of against extraterritoriality cannot overcome the plain language of § 243(h). The presumption against extraterritoriality is just that, a presumption without evidentiary weight that operates only where there is an “unexpressed congressional intent.” *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949); Pet. App. at 16a. Congress’ intent to apply § 243(h) extraterritorially was hardly “unexpressed,” but unambiguously stated.

Furthermore, whatever force the presumption may have with regard to a primarily domestic statute, that force evaporates when a statute that regulates distinctively international subject matter, such as immigration, nationality, and refugees, is involved. The INA operates worldwide.⁵⁹ INS officers work throughout the world. By definition, refugees are persons who either are or have been outside the United States, and executive officials cannot decide whether they should receive asylum without assessing the conditions in their home countries. By their own terms, numerous

⁵⁹ 8 C.F.R. § 100.4(c)(4). See also C. Gordon & S. Mailman, *Immigration Law and Procedure* § 3.11. A key goal of the Refugee Act of 1980 was “[t]o repeal the current immigration law’s discriminating treatment of refugees by providing a new definition of “refugee” that recognizes the plight of the homeless *all over the world*.” S. Rep. No. 256, 96th Cong., 2d Sess. 1 (1979).

sections of the INA apply outside the United States,⁶⁰ while others apply not by their terms, but by their purpose or operation.⁶¹

Thus, petitioners may not invoke a presumption where the executive action at issue has itself extended the statute extraterritorially. Petitioners cite §§ 212(f) and 215(a) of the INA as authority for their actions in reaching well beyond the territory of the United States to seize Haitians and force them back to the land they are fleeing. Pet. Br. at 2. But neither statutory provision specifically authorizes the President to act beyond United States borders. Nor did either authorizing section originally contain territorially limited language that the Refugee Act of 1980 excised. Thus, if petitioners were correct that the presumption against extraterritorial application operates against § 243(h), *a fortiori* it must also deny them the very authority under which they claim to be conducting the entire interdiction.⁶²

As explained in *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991), the presumption acts as a tool of statutory construction which “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Aramco*, 111 S. Ct. at 1230, citing *McCulloch v. Sociedad National de Marineros de Honduras*, 372

⁶⁰See, e.g., §§ 101(a)(42)(B) (definition of “refugee” includes people outside U.S.); 221 (visa issuance abroad); 222 (visa application abroad); 283 (travel expenses outside U.S.); 301, 303, 308, 320-21, and 322 (nationality determined by birth outside the U.S.); 329 (naturalization through military service abroad); 330 (regarding service on U.S. military vessels on high seas).

⁶¹See, e.g., §§ 207 (makes no provision for refugee applications abroad, yet 8 C.F.R. § 207.1(a) does so provide); 234 (no mention of health examinations by U.S. officials outside the United States, yet Public Health Service officials test Haitians at Guantanamo); 235 (by its terms, does not provide for inspection outside the U.S., yet 8 C.F.R. § 235.5 provides for preinspection stations abroad); 329(a) (not requiring extraterritorial awards of posthumous citizenship for certain aliens who served in the U.S. military, yet 8 C.F.R. § 329.2 does so provide).

⁶²Similarly, only petitioners’ attempts to circumvent the constraint of § 243(h), through interdiction on the high seas, results in the extraterritorial reach of the statute. Respondents know of no case in which the presumption, which petitioners manipulate in an attempt to avoid judicial review, has been applied to permit the executive to act extraterritorially, where a statute would preclude such conduct domestically.

U.S. 10, 20-22 (1963).⁶³ Similarly, Justice Stevens' concurring opinion in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992), noted that the question was whether extraterritorial application should be given to a statute regulating the activities of private litigants within another sovereign state.⁶⁴ These comity-based concerns are plainly not implicated when the executive acts on the high seas in an area governed strictly by international law.⁶⁵

More fundamentally, § 243(h) is not just an immigration statute, it is a statute that conforms domestic law to the terms of an international treaty that states a universal and mandatory human rights norm. As an immigration and refugee statute, the INA plainly does not focus on purely domestic affairs of the United States.⁶⁶ For the presumption to be at issue here, petitioners must maintain that application of § 243(h) to the high seas would impinge on the laws of another sovereign. The only other country

⁶³This Court should note that the United States, in *Aramco*, agreed with respondents' position that comity is the driving force behind the presumption, but here, hide that principle. Compare Brief of the EEOC at 25-26, *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (Nos. 89-1838 & 89-1845) ("Title VII is unlikely to generate serious conflicts with the laws of individual foreign states") and Reply Brief of the EEOC at 15-16, *id.* (noting that "international law does not foreclose the extraterritorial application of Title VII in the context of U.S. employers which discriminate against U.S. citizens") with United States Brief at 23-25, *Smith v. United States*, No. 91-1538 (U.S. docketed June 15, 1992) (asserting that the presumption against extraterritoriality is applied generally and forecloses application of U.S. law even where comity is of no concern) and Pet. Br. at 27 ("presumption bars application of federal statutes to the high seas as well as foreign countries").

⁶⁴Indeed, in *Lujan*, the regulation at issue applied the Endangered Species Act both in U.S. territory and on the high seas; the only question was whether it should also apply in the territory of a foreign sovereign. 112 S. Ct. at 2135, citing 3 C.F.R. § 402.01.

⁶⁵Congress need not "make specific provisions in the law that the *locus* shall include the high seas," where "to limit th[e] *locus* to strictly territorial jurisdiction would greatly curtail the scope and usefulness of the statute and leave open a large immunity for [illegal acts] committed . . . on the high seas." *United States v. Bowman*, 260 U.S. 93, 98 (1922).

⁶⁶In another pending case, the United States admits that the "presumption against extraterritoriality 'is based on the assumption that Congress is primarily concerned with domestic conditions.'" Resp. Br. at 26, *Smith v. United States* (No. 91-1538), citing *Foley Bros.*, 336 U.S. at 285.

implicated is Haiti, and no nation can claim the sovereign right to have political refugees returned to it for persecution. The Refugee Act of 1980 specifically sought to conform the INA with Article 33 of the Protocol, precluding any presumption that Congress's enactment of this statute was set against the backdrop of domestic affairs.

Petitioners' claim that the presumption should rewrite the words "any alien" in § 243(h) to exclude "aliens who have been interdicted on the high seas" borders on the frivolous. Congress's definition of the term "alien" as "any person not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3), immediately suggests that Congress's directive that the executive "shall not return or deport any alien" will have an international effect. 8 U.S.C. § 1253(h). Similarly, "any" means any, without regard to geographic limitation. This Court has allowed extraterritorial application of similar general language, without any specific reference to conduct occurring abroad, when comity concerns do not dictate otherwise.⁶⁷

2. Section 243(h) Must Be Construed Consistently With the INA, the Constitution and International Law

If any canons of statutory construction apply here, they are the well-settled principles that statutes must be construed harmoniously and consistent with international law. The Kennebunkport Order does not compel petitioners' policy of forced summary return. By its terms, the President merely purports to grant petitioners unreviewable discretion, which they have exercised by summarily and forcibly returning *bona fide* refugees to conditions of persecution and death in Haiti, a clear-cut violation of § 243(h). By executing such a policy, petitioners have asserted discretion that both exceeds and violates their delegated authority under the INA,

⁶⁷See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 705 (1962) (applying Sherman Act to activity occurring in Canada); *Société Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 211-212 (1958) (applying rules of discovery to parties in Switzerland); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970) (Jones Act provides remedy to alien seaman on foreign-flagged ship); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (Lanham Act speaks of "any person").

a comprehensive statutory scheme enacted by Congress in the exercise of its plenary immigration power.⁶⁸

Petitioners cannot reasonably claim to be acting pursuant to the President's constitutionally enumerated Commander-in-Chief power, an authority nowhere cited in the Kennebunkport Order. This case does not involve the President's power to direct military ships at sea, but rather, petitioners' blanket decision to return all fleeing Haitians to persecution.⁶⁹

Similarly, this case raises no broad challenge to the President's unenumerated constitutional powers over foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).⁷⁰ In his classic concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson made clear that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." 343 U.S. 579, 635 (1952)

⁶⁸When Congress acts in the immigration field, it exercises plenary power. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), which is "not open to question." *INS v. Chadha*, 462 U.S. 919, 940 (1983). Article I, section 8, clause 4 authorizes Congress, not the Executive, to "establish an uniform Rule of Naturalization," thus granting Congress exclusive legislative power in immigration matters. "[O]ver no conceivable subject is the legislative power of Congress more complete...." *Oceanic Steam Navigation Co. v. Stranahan*, 21 U.S. 320, 339 (1909), quoted with approval by, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

⁶⁹Such disregard cannot be justified by an invocation of foreign affairs concerns.

Despite the attorney general's broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests, our examination of the asylum statute convinces us that *Congress intended to prevent such factors from influencing asylum cases*.

Doherty v. United States Dep't of Justice, 908 F.2d 1108, 1118 (2d Cir. 1990) (emphasis added), *rev'd on other grounds*, 112 S. Ct. 719 (1992). Petitioners are hard-pressed to argue that restraints on the Coast Guard infringe upon the Commander-in-Chief power when the President himself has placed that agency under the direct control of the Department of Transportation. Decl. of Admiral Leahy, D.E. 152.

⁷⁰The President's authority to "speak or listen" on behalf of the United States does not include a power to ride roughshod over the rights of individuals or to exceed his authority, because even the President's power as the "sole organ" of our nation in its foreign relations "must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 319-20.

(Jackson, J., concurring). In immigration, the authority of the executive "is limited to the zone charted by Congress. If such [executive] officers depart from the channels of authority fixed by statute they act illegally."⁷¹

In passing § 243(h), Congress has acted, and decisively, to forbid defendants from forcibly returning any alien whose "life or freedom would be threatened." The congressional mandate that defendants not return refugees to their persecutors places this case squarely within "category III" of Justice Jackson's *Youngstown* concurrence. Pet. App. at 35a. The President is acting here in a manner "incompatible with the expressed or implied will of Congress," and therefore "his power is at its lowest ebb, for he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

The grants of authority contained in the Kennebunkport Order authorize the President only to limit "entry" of certain aliens. § 212(f), or to set procedural rules for an alien's departure from or entry to the United States. § 215(a)(1).⁷² Neither can reasonably be read to empower defendants to forcibly and summarily *return* refugees to their persecutors, without any determination of their refugee status. Nor has the President ever before invoked these statutory sections for such a purpose.⁷³ Established rules of statutory construction require that §§ 212(f) and 215(a)(1) of the INA be read consistently with § 243(h) of the same statute. 2 Sutherland, *Statutory Construction* § 4704. Provisions of the same statute governing entry should not be read to provide the authority for gutting that mandatory duty.

⁷¹C. Gordon & S. Mailman, *Immigration Law and Practice* § 9.02, at 9-5, citing *Mahler v. Eby*, 264 U.S. 32 (1924).

⁷²Petitioners also mention 14 U.S.C. § 89(a) as authority to seize and return Haitian vessels in Haitian waters. But defendants' own 1981 OLC Opinion makes clear that the Coast Guard cannot invoke this section to seize Haitian vessels "because the waters of Haiti are not within the jurisdiction of the United States." 5 Op. Off. Legal Counsel at 249 n. 17.

⁷³All previous presidential Proclamations and Executive Orders citing either of these statutory provisions have concerned either restrictions on aliens *entering* the United States or restrictions on U.S. citizens traveling to foreign nations.

Similarly, canons of statutory construction require that these provisions of the INA comport with, not violate, the international obligations of the United States,⁷⁴ embodied in Article 33 of the Protocol and the U.S.-Haiti Agreement. Petitioners' policy of forcing *all* Haitians back to Haiti, including those whom they know to have credible fears of persecution, flatly violates the terms of Article 33 and the U.S.-Haiti bilateral agreement, which implements *with specific regard to Haitian refugees* the universal obligation of *non-refoulement*.

Without Haitian consent under the explicit terms of the executive agreement, defendants have no authority to stop and board Haitian ships on the high seas.⁷⁵ Petitioners cannot abrogate the agreement without giving the Haitian government six months' notice, as the agreement explicitly requires. If petitioners have *de facto* abrogated the agreement, their continued interdiction of Haitian ships is unauthorized and *ultra vires*.

II. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION BY HOLDING THAT THE ELEVENTH CIRCUIT'S RULING BARRING "SCREENED-OUT" HAITIANS FROM CHALLENGING INS SCREENING PROCEDURES DID NOT COLLATERALLY ESTOP "SCREENED-IN" HAITIANS FROM CHALLENGING A NEW POLICY OF FORCED RETURN WITHOUT SCREENING

Throughout this litigation, petitioners have sought to escape judicial scrutiny by hiding behind the doctrine of collateral estoppel. Six of the seven judges who have considered petitioners'

⁷⁴"[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988).

⁷⁵Except when a ship is "engaged in piracy, slave trade, or unauthorized broadcasting," a state may board the vessel of another state *only with the express consent and authorization* of that state. Restatement (Third) of Foreign Relations Law of the United States § 522 & Reporters' Note 8; 1958 Convention on the High Seas, art. 22; 1982 Convention on the Law of the Sea, art. 110; 1 L. Oppenheim, *International Law* § 264 (8th ed. 1955); 5 Op. Off. Legal Counsel 242, 243 & n.4.

collateral estoppel claim have rejected it, all noting that this case involves parties and circumstances different from those presented in *HRC v. Baker*.⁷⁶ The lower courts have correctly ruled that respondents are not collaterally estopped by the Eleventh Circuit's decision in *HRC* because: (1) respondents were not parties to *HRC*; and (2) circumstances have changed dramatically as a result of petitioners' own conduct, rendering preclusion inappropriate as a matter of equity. Petitioners now ask this Court to sit as a court of error and to review *de novo* the determinations made below. Petitioners assert that the lower courts lacked discretion to deny estoppel, demanding that all Haitians be forever precluded from litigating the question whether § 243(h) applies outside the United States. Pet. Br. at 20-21, 24-25.

HRC involved both different parties and changed circumstances from those now before this Court. The courts below correctly determined that the Eleventh Circuit's judgment does not estop respondents, who were neither parties nor privies to the *HRC* litigation. Moreover, the court of appeals acted well within its discretion by declining to apply collateral estoppel because the policy now under review was unforeseeable at the time of *HRC* and the issue here is a pure issue of law which the Eleventh Circuit decided incorrectly. Finally, both the majority and concurring opinions below correctly recognized that to let

the Government keep the Eleventh Circuit ruling from the Supreme Court on a promise that is no longer being honored and then let the Government keep our decision from the Supreme Court by asserting that we had correctly applied collateral estoppel . . . would be gamesmanship of the rankest sort, especially inappropriate in a lawsuit affecting people's lives.

Pet. App. at 40a (Newman, J., concurring). See also *id.* at 14a.

⁷⁶See Pet. App. at 133a-136a (Johnson, J.) (TRO); *id.* at 149a-152a (Johnson, J.) (Preliminary Injunction); *id.* at 86a-96a (*HCC I*) (Pierce & Cardamone, JJ.); *id.* at 7a-14a (Pratt & Newman, JJ.); *id.* at 40a-41a (Newman, JJ.). Without questioning the majority's rejection of petitioners' collateral estoppel claim in *HCC I*, Judge Mahoney implicitly accepted it en route to dissenting on the merits. See *id.* at 118a-124a (Mahoney, J.).

A. Respondents Cannot Be Bound by a Judgment Against the Class in *HRC v. Baker*, to Which They Did Not Belong

One cannot be bound by a prior judgment unless one was a party to, or represented by a privy in, the prior action. See *Parklane Hosiery Co. v. Shore Inc.*, 439 U.S. 322, 327 & n.7 (1979).⁷⁷ Although it is true that “a judgment in a *properly entertained* class action is binding on class members in any subsequent litigation,” *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) (emphasis added), the judgment against the *HRC* plaintiffs cannot bind respondents, both because respondents were not class members in *HRC* and because the *HRC* class action was not properly maintained.⁷⁸ As the Second Circuit has twice recognized, the “screened-out” plaintiff class in *HRC* was defined in “an ‘overly broad’ fashion which did not fairly and adequately represent the interests of the [screened-in] plaintiffs herein.” Pet. App. at 7a. The *HRC* class action was brought by fifteen named plaintiffs who were “screened-out” after being intercepted on the high seas, pursuant to the interdiction program followed by petitioners for more than ten years prior to the Kennebunkport Order. Under that program, interdicted Haitians were either “screened-in” (i.e., found to have a credible fear of persecution) or “screened-out” (i.e., found not to have made such a showing). The “screened-out” *HRC* plaintiffs challenged the adequacy of the then-existing screening procedures, not the denial of any screening

whatsoever. Thus, as Judge Pratt noted, membership in the *HRC* class entailed: current or future detention on cutters or at Guantanamo Bay; interdiction pursuant to the *then-existing* United States Interdiction Program; and denial of first amendment and procedural rights. Pet. App. at 9a-10a.

The class conditionally certified in this case is entirely different. It consists of “[a]ll Haitians who have been or will be ‘screened-in.’” Pet. App. at 10a.⁷⁹ These “screened-in” plaintiffs have never challenged the adequacy of the screening procedures, because they benefitted by them. The “screened-in” plaintiffs in this action cannot be bound by a challenge brought by “screened-out” Haitians to the adequacy of a screening procedure which no longer exists, and with which “screened-in” Haitians did not take issue. Indeed, as the Second Circuit recognized in *HCC I*, the screened-in refugees could not properly have been part of the earlier Florida action, both because none of the named plaintiffs there were screened-in and because the interests of the two groups with regard to the legality of screening were antagonistic. Pet. App. at 93a-96a.

Even if the *HRC* class could be read to include respondents, the courts below held that the class was improperly certified under Fed. R. Civ. P. 23, because respondents’ interests were not adequately represented by the “screened-out” named plaintiffs in *HRC*. The courts below properly reviewed the propriety of the class certification in *HRC* and found it overbroad. Pet. App. at 93a.⁸⁰

⁷⁷Accord *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Hansberry v. Lee*, 311 U.S. 32, 45 (1940); Restatement (Second) of Judgments § 42(1)(b). As this Court repeatedly has held:

[s]ome litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313, 329 (1971); accord *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 (1982).

⁷⁸See Pet. App. at 133a-136a (TRO); *id.* at 149a-152a (Preliminary Injunction); *id.* at 86a-96a (*HCC I*); *id.* at 7a-14a (*HCC II*).

⁷⁹Some 150 class members—including at least one named plaintiff—have been repatriated to Haiti even though petitioners previously screened them in. More than 2,000 others have been interdicted after May 24, 1992, and summarily returned to Haiti. Given that roughly 1/3 of all interdicted were being “screened in” when the Kennebunkport Order issued, perhaps 700 or more of these Haitians would have been “screened in” under the old interdiction program. Still others have not left Haiti, but would have fled and been “screened in” in the future, had the Kennebunkport Order not been promulgated.

⁸⁰An original court’s class definition may guide, but cannot bind, a later court. For “the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action.” Fed. R. Civ. P. 23(c)(3) (Advisory Committee’s note, subdivision (C)(3)(1966)), citing Restatement of Judgments § 86, comment (h), § 116 (1942); accord *Sam Fox* (continued...)

Thus, the Court of Appeals found that if the class certified in *HRC* included respondents, the class certification was improper. Pet. App. at 7a; *id.* at 94a. The “screened-out” and “screened-in” Haitians neither shared the same interest in challenging screening nor suffered the same injury from it. Because respondents were or would be “screened-in,” the “screened-out” *HRC* plaintiffs could not have adequately represented them.⁸¹ See, e.g., *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977), quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974).

In addition, respondents are different parties because the *HRC* class included only those Haitians who were or would be “detained . . . pursuant to the United States Interdiction Program” in effect at the time of *HRC*. After the Kennebunkport Order, the Court of Appeals held, that program no longer exists. Pet. App. at 9a-10a. Respondents are refugees now in Haiti—who either were “screened-in,” or would flee and be screened in if screening were reconstituted—who cannot flee because of the new interdiction program of forced summary return.

Petitioners formalistically claim that the “United States Interdiction Program” in the *HRC* class definition refers to any “program of interdiction” established pursuant to Proclamation 4865 and thus embraces both the discarded program of preliminary

⁸⁰(...continued)

Publishing Co., Inc. v. United States, 366 U.S. 683 (1961). Nor did respondents, most of whom were in Haiti when *HRC* was filed, have reason, opportunity, or legal obligation to challenge the overinclusive class. See *Martin v. Wilks*, 490 U.S. 755 (1989); *Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683 (1961).

⁸¹See *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156-57 (1982); *United Indep. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1274, 1284 (7th Cir. 1985); *Carroll v. American Fed'n of Musicians*, 372 F.2d 155, 161-62 (2d Cir. 1967). In *Falcon*, this Court decertified a class of both employees and applicants for employment where the only class representative was an employee. 457 U.S. at 147. The Court, rejecting “across the board” claims, held that employees could not claim to represent applicants unless “the discrimination manifested itself in hiring and promotion practices in the same general fashion . . .” *Id.* at 159 n.15. Similarly, the *HRC* plaintiffs did not challenge any general policy affecting “screened-ins,” and “screened-ins” were not denied the rights which plaintiffs sought.

screening before return and the current program of forced, summary return. Pet. Br. at 20, n.12. As the *HRC* courts understood, however, the “United States Interdiction Program” at issue in *HRC* was a program of interdiction, screening and repatriation established by Executive Order 12,324.⁸² Proclamation 4865 announces only the President’s decision to suspend entry and interdict boats on the high seas, making no reference to the range of lawful or unlawful actions that might follow an interdiction. For ten years, this proclamation was the basis for the program established by Executive Order 12,324; since May 24, the proclamation instead announced the Kennebunkport Order, which “revoked and replaced” the previous executive order. Pet. App. at 263a, with the new program of summary return. To suggest that the two programs are the same is like suggesting that a program of lawful incarceration and cruel and unusual punishment are the same, so long as both cite the same presidential proclamation as authority. Because respondents are not being processed pursuant to the same program as the *HRC* plaintiffs, they cannot be members of the *HRC* class.

Finally, petitioners claim inequity, arguing that if the Eleventh Circuit had ruled for the plaintiffs in *HRC*, “the government could hardly have escaped the preclusive effect of that judgment by eliminating refugee screening . . .” Pet. Br. at 26-27. But if petitioners had lost in *HRC*, they would now be arguing that respondents were not properly part of the *HRC* class, invoking *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (offensive non-mutual collateral estoppel cannot be maintained against government). Because the Eleventh Circuit in fact ruled for petitioners, they now argue that the *HRC* class enveloped all Haitians who might ever flee from Haiti. In short, petitioners, not respondents, promote inequity by asking this Court to deny the

⁸²In *HRC*, the Florida district court noted that Executive Order 12,324, not the proclamation, “sets forth the *interdiction programprogram* was intended as an emergency measure to deal with a situation that the President determined to be detrimental to the interests of the United States.” Pet. App. at 217a (emphasis added).

"screened-in" Haitians their day in court to challenge the Kennebunkport Order.⁸³

B. The Second Circuit Did Not Abuse Its Discretion in Declining to Apply Collateral Estoppel in Light of the Equitable Considerations and Changed Circumstances of This Case

Courts have "broad discretion" to deny application of collateral estoppel. *Parklane Hosiery*, 439 U.S. at 331. Because "[t]he actual decision whether to apply collateral estoppel undoubtedly involves equitable considerations . . . [it] is therefore subject to review under an abuse of discretion standard." *In re McWhorter*, 887 F.2d 1564, 1566 (11th Cir. 1989).⁸⁴ Petitioners ask this Court to redetermine the Second Circuit's ruling *de novo*, never addressing the Second Circuit's conclusion that the combined weight of equitable considerations justifies relitigating the legal issues. Pet. App. 11a-14a. For four reasons, the Second Circuit did not abuse its discretion when it decided that, "even if all of the requirements for issue preclusion [were] met," equitable considerations rendered collateral estoppel inappropriate. Pet. App. at 11a.

First, when deciding "pure questions of law," this Court has always weighed the equities to determine whether "preclusion may be inappropriate." *Montana v. United States*, 440 U.S. 147, 162 (1979). In such cases, courts often find that the goals of finality and judicial economy, which typically justify preclusion, are outweighed by other considerations. The court of appeals specifically found that the more flexible doctrine of *stare decisis* adequately protected the interests of the litigants, rendering estoppel unnecessary. Pet. App. at 12a. Petitioners claim that the court of appeals' ruling has not saved judicial resources, but any waste of

⁸³Restatement (Second) of Judgments § 28(2) (1982) ("a new determination is warranted in order to . . . avoid inequitable administration of the laws").

⁸⁴Accord *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1177 (3d Cir. 1990); *United States v. Kaytso*, 868 F.2d 1020, 1022 (9th Cir. 1989); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985); *Jack Faucett Assocs. v. American Telephone & Telegraph Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984), cert. denied, 469 U.S. 1196 (1985).

judicial resources here has resulted not from the courts' refusal to apply collateral estoppel, but from petitioners' persistence in lawless conduct.

Second, in *Mendoza*, 464 U.S. at 160, this Court noted that "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." See also *E.J. du Pont de Nemours v. Train*, 430 U.S. 112, 135 n.26 (1977). Collaterally estopping different circuits from redetermining pure legal issues "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160. This concern is particularly serious when class relief is sought and the first decision is as shallow and erroneous as *HRC*.

In this case, the *HRC* class certification was so broad that it would preclude any litigation of the extraterritorial application of § 243(h). Because the Haitian interdiction program is unique, it is unlikely any other group will be able to challenge the Eleventh Circuit's ruling that the United States has no extraterritorial obligations to refugees.⁸⁵ To mandate estoppel here would forever bar this Court from deciding an important issue on which the Second and Eleventh Circuits are squarely divided. To forestall that possibility, this Court would have to grant *certiorari* the first time important legal issues are raised in order to preserve its ability to decide them. This would substantially dilute the well-established practice of percolation, whereby multiple courts of appeals can pass upon an issue before the Supreme Court grants *certiorari*.

Third, the Second Circuit properly weighed petitioners' prior representation to this Court when they successfully opposed *certiorari* months ago in *HRC*.⁸⁶ The Second Circuit emphasized

⁸⁵ Haitians are currently the only group interdicted on the high seas and returned to a country in which they face persecution. Although the United States also interdicts Cubans, it does not return them. Therefore, unless the United States begins interdicting and returning another class of people, there will never be another chance to relitigate the applicability of § 243(h).

⁸⁶At that time, the Solicitor General expressly represented that "screened-in" individuals would be brought to the United States so that they could file applications under the INA for asylum. See Brief for United States in (continued...)

that it was concerned not with the denial of review, but with the circumstances surrounding the denial of review. Petitioners made a representation to this Court to persuade it to deny *certiorari*.⁸⁷ It now seeks to deny this and any other court the opportunity to review an entirely new policy. As Judge Newman wrote in his concurring opinion, which Judge Pratt joined:

the Government cannot fend off such review on a promise to pursue one policy, then abandon that policy, and then use that unreviewed decision, insulated from review by a representation no longer being honored, to obtain a collateral estoppel ruling from this Court as to the lawfulness of the new policy.

Pet. App. at 41a.

Finally, petitioners claim that “a change in the defendants’ own conduct manifestly does not constitute an ‘intervening change’ in the controlling principles under which the legality of that conduct must be evaluated.” Pet. Br. at 22. But our claim is different: preclusion is inappropriate where, as here

[t]here is a clear and convincing need for a new determination of the issues (a) because of the potential adverse impact of the determination on the public interest [or]. . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action . . .

86(...continued)

Opposition to Certiorari at 3, *HRC v. Baker, cert. denied*, 112 S. Ct. 1245 (1992). Only five days after this Court denied *certiorari*, and judicial oversight ended, petitioners announced that it would not bring to the United States certain refugees found to have credible fears, and began rescreening those refugees on Guantanamo and returning them to Haiti. Less than three months later, the President issued the Kennebunkport Order, and petitioners announced that no interdicted Haitians, whether or not they had credible fears, would be brought to the United States.

87Petitioners’ representation was material, because this Court may reasonably have determined that § 243(h) was not directly implicated by petitioners’ conduct. For, even if petitioners made some mistakes in screening, they were bringing to the U.S. anyone who demonstrated a “credible” fear of persecution. Thus, petitioners were unlikely to return to Haiti anyone who could prove under § 243(h) that it was more likely than not that his life or freedom would be threatened.

Restatement (Second) of Judgments § 28(5) (1982).

Petitioners concede that the executive policy now under challenge represents a change from “the government’s then-current practice” when *HRC* was decided, but argue that “the entire thrust of the government’s position was that the President must retain flexibility to respond to international developments free from judicial interference.” Pet. at 16 n. 11. In fact, the program of preliminary screening before return had been in place for more than a decade, and the “thrust” of the Solicitor General’s earlier position was that this Court should not interfere with the Executive’s “longstanding policy” of interdicting and screening Haitian refugees, particularly when “screened-in” refugees were being brought to the United States for asylum hearings accompanied by the full panoply of procedural rights. *See Brief for United States in Opposition to Certiorari* at 8, 10, *HRC v. Baker, cert. denied*, 112 S. Ct. 1245 (1992) (J.A. at 252, 258). For preclusion purposes, the critical question is not whether petitioners knew that a representation was false when made, but whether circumstances have so changed *after that time* as now to make it inequitable to permit petitioners to escape judicial review of their subsequent actions.

Since *HRC*, petitioners have dispensed with screening altogether under the Kennebunkport Order. The interdiction policy now under challenge did not exist—and hence could not be subjected to judicial review—in any prior action. When *HRC* was decided, it was not foreseeable that the § 243(h) issue would arise again in the context of a subsequent action challenging a policy of forced summary return. Moreover, given the Eleventh Circuit’s error and the importance of the legal issue, there is clearly a need for a new determination of the issues because of the potential adverse impact of the determination on the public interest. If petitioners had their way, a litigant could test the legality of a comparatively benign practice, then invoke collateral estoppel to hide behind that ruling in a subsequent action challenging an egregiously lawless practice that had not been implemented, announced or even hinted at when the prior practice was being adjudicated. As the Second Circuit correctly reasoned:

[W]hen the United States (a) resists Supreme Court review on a dramatic issue of such public import ..., by representing that

there will be screening of intercepted aliens followed by full consideration of asylum rights, (b) achieves the desired denial of *certiorari*, and then (c) embarks on a completely contrary policy, that is a change of the type that ought to permit an inferior court, unfettered by estoppel, to adjudicate the merits of a new case based on the new circumstances.

Pet. App. at 14a.

III. NOTHING IN THE ADMINISTRATIVE PROCEDURE ACT OR THE IMMIGRATION AND NATIONALITY ACT DIVESTS THE DISTRICT COURT OF ITS AUTHORITY TO REVIEW OR ISSUE INJUNCTIVE RELIEF IN THIS CASE

To mask the weakness of their collateral estoppel argument, petitioners develop two new claims of nonreviewability before this Court. They claim first, that the INA "impliedly precludes" judicial review under the APA, 5 U.S.C. § 701(a)(1), and second, that 5 U.S.C. § 702(1) required the district court to deny injunctive relief and dismiss this suit before reaching the merits. Both assertions are wrong.

A. The Immigration and Nationality Act Does Not Preclude Judicial Review of Petitioners' Policy of Forced, Summary Return

The APA confers on "a person . . . adversely affected or aggrieved by agency action" a cause of action for injunctive relief against executive branch officials. 5 U.S.C. § 702 (1988). Neither territorial nor citizenship limits restrict the availability of APA review. Nonresident aliens located outside of the U.S. qualify as "persons aggrieved by agency action" entitled to obtain review in U.S. courts of the legality of U.S. governmental acts.⁸⁸

⁸⁸See, e.g., *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1191-92 (D.C. Cir. 1972); *DKT Memorial Fund Ltd. v. A.J.D.*, 691 F. Supp. 394, 400 (D.D.C. 1988) ("[T]he Court finds [foreign plaintiffs] have standing to assert their claims under the . . . APA."), aff'd in pertinent part, rev'd in part, 887 F.2d 275, 281-82 (D.C. Cir. 1989); *People of Saipan v. United States Dep't of Interior*, 356 F. Supp. 645, 653 (D. Haw. 1973) ("[T]his court will not deny plaintiffs standing in this suit because of their status as nonresident aliens where no such congressional intent is manifested in . . . the

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Particularly in the immigration context, courts have permitted aliens located outside of the United States to obtain review of the legality of U.S. government actions adversely affecting them.⁸⁹

The APA authorizes reviewing courts, at the request of aggrieved persons, to "hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional . . . power . . . [or] (c) in excess of statutory authority." *Id.* § 706(2). As we have shown, petitioners' forced repatriation policy plainly constitutes final "agency action" that violates § 243(h) and lacks both statutory and constitutional authority. Pet. App. at 35a-38a. The action is final because "the agency has completed its decisionmaking process, and . . . the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992). As persons aggrieved by that policy, respondents undeniably have standing to challenge that agency action.⁹⁰ Accordingly, the Court of Appeals acted properly by reviewing petitioners' policy and "hold[ing it] unlawful and set[ting it] aside." *Id.* § 706(2).

Petitioners now claim that the INA "impliedly" precludes judicial review under 5 U.S.C. § 701(a)(1).⁹¹ This claim flies in

88(...continued)

APA."), aff'd as modified, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975). See generally cases cited in Brief *Amicus Curiae* of American Immigration Lawyers' Association (AILA) at Part IIC.

89See, e.g., *Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979) (class of visa applicants including aliens living in Mexico granted APA review of INS interpretation of statute allocating visas); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (reviewing legality of deportation order on behalf of alien located abroad); *Marez v. INS*, 732 F.2d 58 (6th Cir. 1984) (same). See generally cases cited in AILA Brief at Part IIIA.

90See generally cases cited in AILA Brief at Part III (discussing respondents' standing). Petitioners do not challenge, and have not challenged, respondents' standing to bring this action. The issue of standing is, however, raised in Brief *Amicus Curiae* of FAIR, but is soundly rebutted by AILA Brief at Part III. Respondents incorporate AILA's arguments by reference here.

91Section 701(a)(1) of the APA states: "This chapter applies, according to the provisions thereof, except to the extent that . . . statutes preclude judicial review." Significantly, the opinion below rejected this claim without discussion and both the Second Circuit here and the Eleventh Circuit in *HRC* have,

(continued...)

the face of the settled principle that section 702 of the APA creates a strong presumption favoring judicial review of all final agency actions. Second, petitioners fail to overcome the heavy presumption in favor of reviewability by demonstrating either an explicit or an implicit congressional intent to preclude judicial review.

This Court has unanimously declared its strong presumption that Congress intends judicial review of administrative action.⁹² Applying the presumption, the Court has repeatedly held that APA review is available in suits brought against foreign affairs and immigration-related policies.⁹³ The strong presumption in favor of

⁹¹(..continued)

without regard to this claim, reviewed the legality of the various Haitian interdiction programs on the merits. The Second Circuit's decision contains no holding or analysis of any kind about the APA or the availability of judicial review under it. Nor did the Eleventh Circuit in *HRC* accept petitioners' analysis of the APA. By rejecting plaintiffs' § 1253(h) claim "on the merits" after denying judicial review under the APA, petitioners effectively recognized that the plaintiffs had a cause of action *independent* of the APA. Pet. at 14 n.7.

⁹²See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("[w]e begin with the strong presumption that Congress intends judicial review of administrative action. . . [O]ur cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). This presumption is so strong that even when Congress bars judicial review explicitly, where the equities are compelling, "even this most unambiguous of Congressional statements precluding judicial review would be overcome."

Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

⁹³See, e.g., *McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888 (1991); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). See also *Pancho Villa Restaurant, Inc. v. United States Dep't of Labor*, 796 F.2d 596 (2d Cir. 1986); *Dina v. Attorney General*, 793 F.2d 473, 476-77 (2d Cir. 1986); *Shoreham Cooperative Apple Producers Ass'n Inc. v. Donovan*, 764 F.2d 135 (2d Cir. 1985). Petitioners' reliance on *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) is misplaced. That case involved the issuance of a security clearance, "a sensitive and *inherently discretionary judgment call* [which] is committed by law to the appropriate agency of the Executive Branch" (emphasis added). The *Egan* court added that "[i]t should be obvious that no one has a 'right' to a security clearance," 484 U.S. at 528, and stated: "it is not reasonably possible for an outside non-expert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence." *Id.* at (continued...)

judicial review of administrative action does not evaporate in a case involving construction of the INA.⁹⁴ In *McNary*, this Court declared that the INA's restrictions on judicial review of individual adjudications must not be read to preclude judicial review of general policies, practices or procedures affecting the rights of aliens, in "the absence of clear congressional language mandating preclusion." 111 S. Ct. at 892. In this case, no such clear congressional language mandating preclusion exists. Accordingly, petitioners have not provided the "clear and convincing evidence" necessary to overcome the presumption of reviewability. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

1. Petitioners Cannot Demonstrate an Express Congressional Intent in the INA to Preclude Review

Petitioners argue that by enacting and amending the INA, Congress intended to statutorily preclude all APA review of the legality of agency actions affecting refugees located outside of the U.S.⁹⁵ Pet. Br. at 14-15. However, the text and structure of the INA give rise to no such inference and petitioners can point to no provision that expressly limits judicial review here. The only provision they cite, 8 U.S.C. § 1105a, makes review in the courts of appeal the exclusive procedure for "judicial review of all *final orders of deportation*," *id.* § 1105a(a) (emphasis added), while § 1105a(b) makes habeas corpus the sole mode of judicial review of a final order of exclusion. Significantly, neither provision precludes judicial review of governmental conduct towards aliens that arises wholly outside the deportation or exclusion process. Nor does either procedure preclude judicial review of government

⁹³(..continued)

529. Here, respondents do have a right to *non-refoulement* and it is possible to review the question whether petitioners' policy of forced, summary return complies with section 243(h) and the treaty. These determinations, unlike those in *Egan*, are not committed by law to agency discretion.

⁹⁴See *McNary v. HRC*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985); *Marcello v. Bonds*, 349 U.S. 302 (1955).

⁹⁵ This alleged objection pertains only to the availability of APA review of plaintiffs' claim under § 243(h). Thus, defendants implicitly acknowledge that no such bar to APA review exists for plaintiffs' claims under Article 33, the U.S.-Haiti agreement, and the Fifth Amendment.

policies, as opposed to individual deportation or exclusion orders. Thus, by its terms and as consistently applied by this Court, § 1105a does not bar judicial review of claims such as those here, which are wholly unrelated to deportation or exclusion proceedings and which challenge not the review of *individual* case adjudications, but a new executive policy of forced return without agency procedures.⁹⁶ Courts have routinely reviewed a wide range of immigration decisions and practices that occur outside deportation proceedings and for which no specialized INA statutory review provisions exist.⁹⁷

Nor can petitioners plausibly claim that Congress has expressed some general “unwillingness to permit judicial review of immigration decisions concerning aliens outside the United States who have ‘never presented [themselves] at the borders.’” Pet. Br. at 15. They can cite no clause in the INA that expressly forecloses review in such circumstances, resting on a single line of dictum in a footnote of a thirty-six year-old case, *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3 (1956). Yet placed in context, *Tom We Shung* suggests nothing of the kind. The question there was whether an alien child of a serviceman could challenge exclusion by declaratory judgment rather than habeas corpus review. The Court answered yes, but cautioned that declaratory relief might not be available to “an alien who has never presented himself at the

⁹⁶See *McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985); *INS v. Chadha*, 462 U.S. 919, 937-39 (1983) (§ 1105a governs review of matters “on which *the final order* is contingent”) (emphasis added). See generally T.A. Aleinikoff & D. Martin, *Immigration Process and Policy*, 854-62 (2d ed. 1991).

⁹⁷See, e.g., *ILWU v. Meese*, 891 F.2d 1374 (9th Cir. 1989); *Pancho Villa Restaurant, Inc. v. United States Dep’t of Labor*, 796 F.2d 596 (2d Cir. 1986); *Dina v. Attorney General*, 793 F.2d 473 (2d Cir. 1986); *Parcham v. INS*, 769 F.2d 1001 (4th Cir. 1985); *Shoreham Cooperative Apple Producers Ass’n v. Donovan*, 764 F.2d 135 (2d Cir. 1985); *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985); *Carnejo-Molina v. INS*, 649 F.2d 1145 (5th Cir. 1981). Petitioners’ reliance on *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984), quoted in Pet. Br. at 13-14, is similarly misplaced, because respondents seek review of an unlawful immigration policy of summary return without screening, not “particular issues,” e.g., a final administrative order of deportation, for which the INA has established a “detailed mechanism for judicial review.” Pet. Br. at 15, quoting *Block*, 467 U.S. at 351.

Community Nutrition Inst., 467 U.S. 340, 351 (1984), quoted in Pet. Br. at 13-14, is similarly misplaced, because respondents seek review of an unlawful immigration policy of summary return without screening, not “particular issues,” e.g., a final administrative order of deportation, for which the INA has established a “detailed mechanism for judicial review.” Pet. Br. at 15, quoting *Block*, 467 U.S. at 351.

borders of this country.” In 1961 Congress enacted section 1105a(b), which overruled *Tom We Shung* and removed the availability of declaratory relief to challenge exclusion orders. But by so acting, Congress nowhere expressed some broad unwillingness to preclude all APA review for aliens who have not presented themselves at our borders.

Thus, petitioners mislead the Court when they suggest that

[i]n light of Congress’ preclusion of review under the APA even for aliens who have reached our borders, it follows *a fortiori* that aliens who have never reached our borders may not invoke the APA to challenge governmental actions in connection with their efforts to enter the United States.

Pet. Br. at 16.⁹⁸ Petitioners’ premise is wrong because Congress has not precluded review under the APA for aliens who have reached our borders. Although Congress has channeled judicial review of individual deportation and exclusion orders into particular modes, APA review remains for general challenges to immigration policies. Similarly, petitioners’ conclusion is wrong for the simple reason that respondents sue here not to gain entry, but to prevent their forced return to Haiti, a general policy for which APA review

⁹⁸Petitioners seek support for this claim in the narrow and anomalous rule against reviewability of visa decisions by consular officials. Pet. Br. at 15 n.8. As *Amicus AILA* points out, this doctrine is a historical anomaly that cannot be elevated into a blanket bar against judicial review of an interdiction policy that is set by *nonconsular* executive officials. Moreover, it applies only to exercises of consular discretion with regard to individual visas and does not foreclose judicial review of generally applicable INS policies like the one under challenge here. The doctrine applies without regard to whether the alien visa applicant is located in the U.S. or abroad, and thus cannot be read to reflect some general congressional intent to deny APA review to claims of aliens outside the United States. See, e.g., *Burrafato v. United States Dep’t of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976) (alien inside United States facing deportation proceedings denied judicial review of consul’s decision); *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928) (same for alien in exclusion proceedings); *Pena v. Kissinger*, 409 F. Supp. 1182 (S.D.N.Y. 1976) (same for alien outside and spouse inside United States). Finally, this doctrine is now rooted in a specific statutory provision concerning consuls, 8 U.S.C. §§ 1104(a), 1201. It lends no support to the claim that there exists a general statutory bar to judicial review of immigration decisions by other officials.

is available to any aggrieved person. Congress has never expressed any blanket intent to foreclose judicial review of actions by petitioners that would, through interdiction and repatriation, totally prevent aliens from presenting themselves at our borders.

2. Petitioners Cannot Demonstrate an Implied Congressional Intent in the INA to Preclude Review

Petitioners also argue that both the nature of the administrative action they challenge and the type of problem involved favor barring judicial review here. Pet. Br. at 17-18. But when preclusion of judicial review is involved, the issue is not merely executive convenience, but congressional intent. Petitioners identify no congressional intent to preclude judicial review "fairly discernible" in the statutory scheme of § 243(h). *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

Nor do petitioners establish implied preclusion under § 243(h) by noting that Congress provided overseas refugees no judicial review of their claims under § 207. In fact, all three key provisions of the Refugee Act, §§ 207, 208, and 243(h), are equally silent on the issue of judicial review and evidence no general or specific congressional intent to target overseas refugees for denial of procedural rights.⁹⁹ Legislative silence alone cannot be read to preclude judicial review, particularly when Congress passed the APA "[with the general purpose] to remove obstacles to judicial review of the agency action under subsequently enacted statutes like the 1952 Immigration Act." *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). Thus, "[t]he existence of an express preclusion of judicial review in one section of a statute [regarding deportation and exclusion] . . . is not conclusive with respect to reviewability

under other sections of the statute," such as § 243(h). *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977).¹⁰⁰

In the end, petitioners argue that their violations of § 243(h) are unreviewable, because they represent foreign policy or military determinations of the President. Pet. Br. at 18. When immigration matters touch foreign affairs, they argue, this Court should invert the normal presumption of reviewability and treat the matter as unreviewable "in the absence of the clearest expression of congressional intent to allow them to do so." *Id.* This Court has never recognized such a perverse "clear statement" rule. The Court regularly reviews claims that executive branch officials have violated the immigration statutes, without regard to the foreign policy consequences. See, e.g., *INS v. Doherty*, 112 S. Ct. 719 (1992); *Jean v. Nelson*, 472 U.S. 846 (1985). The fact that the President's agents are forcibly returning Haitians based upon the altogether distinct statutory authority to restrict entry is a reason to invalidate that action, not hold it unreviewable. See Pet. Br. at 17 (citing §§ 212(f) and 215 of the INA). See also Amicus Brief of AILA, Part IV. Similarly, the fact that the President has acted by executive order does not insulate petitioners' action from APA review. Unlike *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this suit challenges not the discretionary actions of the President, but the acts of lower level officials located within APA agencies, principally the Justice Department and the Coast Guard, that violate the mandatory *non-refoulement* language of § 243(h) and Article 33. The President's executive order nowhere commands petitioners to return Haitian refugees summarily to Haiti; it merely leaves that decision to their allegedly "unreviewable discretion." Kennebunkport Order, § 2(c)(3). The question whether those officials have exercised their discretion in violation of an unambiguous statutory mandate is hardly one that is immune from judicial review. As Justice White wrote for this Court in *Japan*

⁹⁹ It is because of a separate statutory provision, INA § 106, 8 U.S.C. § 1105a (J.A. at 334-39), that decisions with respect to exclusion and withholding of deportation are reviewable. Section 106 expressly provides for review of INS orders of deportation and exclusion and did so before either the U.S. ratification of the Refugee Protocol or the passage of the Refugee Act of 1980. This provision serves as a vehicle for reviewing decisions on § 208 asylum and § 243(h) withholding of deportation only because these forms of relief may be requested in the course of exclusion and deportation proceedings.

¹⁰⁰ "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (quoting L. Jaffe, *Judicial Control of Administrative Action* 357, 336-59 (1965)).

Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986):

We are cognizant of the interplay between these [statutes] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

B. Nothing in 5 U.S.C. § 702(1) Requires the District Court to Dismiss This Action or to Deny Equitable Relief

Petitioners finally assert, virtually without argument, that the judicial review provision of the APA somehow imposes a duty upon the district court to deny injunctive relief and dismiss this suit, without reaching the merits. Pet. Br. at 55-57, n.45. For this novel proposition, petitioners rely upon the last sentence of 5 U.S.C. § 702(1), which provides that “[n]othing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.”

By its terms, the provision serves as a savings clause designed to preserve, not shrink, the scope of review and equitable discretion of federal courts reviewing agency action. The provision expresses congressional intent not to alter a court’s traditional equitable discretion or to abrogate various preexisting limits to judicial review, such as standing and justiciability.

The legislative history of 5 U.S.C. § 702(1) underscores that the provision lacks independent content.¹⁰¹ Nor does the legislative history anywhere reflect the sort of blind deference to

¹⁰¹The House Report declares that the provision “was not intended to affect or change defenses other than sovereign immunity” and all other defenses “remain unchanged.” H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12 (1976). See also *Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

executive prerogatives that petitioners advocate.¹⁰² No court that has considered the Haitian refugee litigation has relied upon this provision.¹⁰³ Nor to our knowledge, has any court ever accepted petitioners’ claim that this provision acts, of its own force, as a “fundamental limitation” on equitable relief in immigration cases that touch upon foreign affairs. Pet. Br. at 56.¹⁰⁴ To the contrary, federal courts routinely grant injunctions in immigration cases.¹⁰⁵

¹⁰²See, e.g., S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976) (“To the extent that this obsolete [sovereign] immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsive Government.”).

¹⁰³Nor has this issue been fully briefed or argued in any court. Indeed, petitioners’ brief below contains only one short paragraph referring to section 702(1) of the APA. See Pet. Br. at 62.

¹⁰⁴None of cases cited by the Solicitor General, see Pet. Br. at 56 n.45, support this novel proposition. In *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam), this Court vacated and remanded a district court ruling, but nowhere cited 5 U.S.C. § 702(1), nor suggested that the district court should dismiss the case as inappropriate for injunctive relief. “[W]here, as here,” the Court cautioned, “a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings,” a ruling plainly irrelevant to the question of statutory construction here (emphasis added). Similarly, *Webster v. Doe*, 486 U.S. 592, 604-05 (1987), revolved not around § 702(1), but whether a section of the National Security Act precluded judicial review under § 701(a)(2) of the APA. Without mentioning § 702(1) or requiring dismissal of the suit on national security grounds, Chief Justice Rehnquist reaffirmed that “traditional equitable principles requiring the balancing of public and private interests control the grant of . . . injunctive relief.” 486 U.S. at 604-05. Similarly, petitioners cite *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) for their claim that lower federal courts have a broad roving power to deny equitable relief to aliens outside the United States. But in *Sanchez-Espinoza*, plaintiffs sought equitable relief against federal officials to stop torts committed by U.S.-funded military actors during a war in Nicaragua. No federal statute, such as § 243(h), imposed a mandatory duty on executive officials that the court could enforce.

¹⁰⁵See, e.g., *Haitian Refugee Center v. Nelson*, 694 F. Supp. 864, (S.D. Fla. 1988), aff'd, 872 F.2d 1555 (11th Cir. 1989), aff'd sub nom. *McNary v. HRC*, 111 S. Ct. 888 (1990) (enjoining INS from applying procedures in Special Agricultural Worker application process depriving applicants of constitutional and statutory rights); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (enjoining INS from depriving Haitians of due process by accelerating asylum and deportation proceedings); *Orantes-Hernandez v.*

(continued...)

Unless statutes clearly intend to alter the courts' equitable discretion, they should not be so read, because "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

In this case, the district court applied traditional standards for injunctive relief and found, as a matter of fact, that petitioners "undeniably [made] a substantial showing of irreparable harm." Pet. App. at 166a. Petitioners did not even contest that factual finding before the Second Circuit, which reiterated that "heightened political repression [is] currently occurring in Haiti [and that] specific plaintiffs who had been returned have since been abused, were tortured and were in hiding in fear for their lives." *Id.* at 5a, 6a. Under the "two-court rule," these unchallenged factual findings deserve substantial deference from this Court. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). This Court should not now sit as a court of first instance to entertain petitioners' specious factual assertions. "This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." *Berenyi v. District Director*, 385 U.S. 630, 636 (1967).¹⁰⁶

In short, nothing supports petitioners' claim that Congress sought in 5 U.S.C. § 702(1) to create a vague, standardless judicial discretion to deny equitable relief. Absent statutory underpinning,

¹⁰⁵(...continued)

Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (permanently enjoining INS from procedures exhibiting pattern and practice of violating rights of aliens held in INS custody).

¹⁰⁶The Government's concern that *our clients* will suffer loss of life rings particularly hollow, when those clients would themselves risk flight rather than languish in suicidal conditions in Haiti. Similarly, petitioners' claim that the injunction will "recharge the migrant crisis" ignores their own admissions at oral argument before the Second Circuit that "there is no doubt multiple causation for individuals leaving" Haiti. Tr. of Oral Argument, *HCC I*, at 29 (statement of Assistant Attorney General Gerson). *Accord* Tr. of May 29 Oral Argument at 61 (statement of Solicitor General Starr) ("we have never said that there are not other factors causing the migration" in addition to judicial injunction).

petitioners' argument reduces to the claim that lower federal courts possess free-floating power—in the name of separation of powers—to find immigration injunctions "inappropriate" and dismiss complaints even when actions of INS and other executive officials plainly violate statute and treaty. See generally Pet. Br. at 56-57. The Second Circuit soundly rejected this claim. Pet. App. at 38a. This case involves a straightforward question of statutory interpretation. Courts undeniably have the power to review executive acts in the immigration field that are not authorized by or consistent with congressional directives.¹⁰⁷

Similarly, the Second Circuit correctly rejected petitioners' overblown claims that the injunction will interfere with the President's conduct of foreign, military or diplomatic policy.¹⁰⁸ The Court of Appeals found that Congress, in the exercise of its "'complete,' 'plenary' legislative power over immigration matters . . . has spoken directly to the question at issue so that '[t]his is a job for the Nation's lawmakers, not for its military authorities.'" Pet. App. at 37a (citations omitted). The injunction merely clarifies that the Kennebunkport Order is not the only law in this area. An executive order cannot confer upon the President's subordinates unfettered discretion to violate § 243(h), a duly enacted statutory provision carefully crafted by both Congress and the President.

Likewise, petitioners assert that the injunction "undermine[s] the ability of this Nation to speak with one voice." Pet. Br. at 57. But the Senate and the President spoke with one voice when they ratified Article 33 and enacted § 243(h). Petitioners are now disrupting that single voice by acting in violation of both the statute and the treaty.

In sum, neither statute nor judicial precedent authorize lower federal courts to refuse to enforce the law or to exercise an

¹⁰⁷Particularly in immigration cases, the "judiciary is the final authority on issues of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. at 447 (quoting *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

¹⁰⁸As the Second Circuit pointed out, those claims are rendered all the more suspicious by § 3 of the "executive order [which] specifically states that it was 'intended only to improve the internal management of the Executive Branch.'" Pet. App. at 37a.

unchecked and unchartered power to dismiss cases that are properly before them. Where, as here, "the enjoined defendant is a responsible government officer residing in the nation's capital, who by virtue of his oath of office is sworn to uphold the . . . laws of the United States," *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 n.29 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985), "it is the role of the courts within the constitutional scheme to adjudicate and remedy claims of actual injury resulting from specific, unlawful Executive action." *Id.* at 1531 (emphasis in the original).¹⁰⁹

Finally, petitioners cannot protest based on claims of presidential flexibility. Pet. Br. at 56. Even before the injunction issued, the President lacked the "flexibility" to act in violation of the INA. The injunction does not meaningfully limit the President's foreign policy options; it merely removes an illegal policy option that no government official is free to choose.

¹⁰⁹As in *Ramirez*, the injunction here does not run extraterritorially, but "against officials of the United States government present in Washington, D.C." 745 F.2d at 1531. Petitioners cite the dissenting opinion in *Ramirez*, ignoring the *en banc* majority's conclusion that "the foreign affairs context of Executive action cannot shield unlawful conduct from judicial inquiry." *Id.* at 1530. *Ramirez* did not apply 5 U.S.C. §702(1), but rather, held that a federal court "must take jurisdiction" of a complaint that "is neither insubstantial nor frivolous." *Id.* at 1533. With regard to injunctive relief, the *Ramirez* majority cited a "long line of cases that permit judicial relief for unlawful . . . action by officials of the Executive Branch of the government, including relief against unlawful actions taken in the context of foreign and military affairs." *Id.* at 1530 (collecting cases).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION
AND NATURALIZATION SERVICE, ET AL.,

Petitioners.

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

AFFIDAVIT OF LOUIS HENKIN

I, Louis Henkin, swear under penalty of perjury that the following is true and correct to the best of my knowledge and recollection:

1. I am University Professor Emeritus and Special Service Professor at Columbia University, where I have taught since 1962. I have taught constitutional law, international law, the law of American foreign relations, and human rights law. I am also currently the President of the American Society of International Law. Before coming to Columbia, I was a law clerk to Justice Felix Frankfurter (from 1946-47), a Foreign Affairs Officer at the United States Department of State (from 1945 to 1946 and 1948-1957), a Consultant to the United Nations Legal Department (from 1947-48), and a professor at the University of Pennsylvania Law School (from 1957-62). I have published numerous books and articles on foreign affairs and the constitution, international human rights, and public international law, including *Cases and Materials on International Law* (ed. with R. Pugh, O.

Schachter & H. Smit), and *International Law: Politics, Values and Functions* (1989). From 1978 to 1984, I served as Co-Editor-in-Chief of the *American Journal of International Law*. From 1979 to 1987, I served as the Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*.

2. During my years at the State Department, I was designated to serve as the United States Representative to the United Nations *Ad Hoc Committee on Statelessness and Related Problems*. The Committee was responsible for drafting a convention relating to the status of refugees, which ultimately became the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Refugee Convention"). I actively participated as the United States delegate in all of the meetings of the Committee.
3. Section 2 of Executive Order No. 12,807 states that the terms of Article 33 of the Convention "do not extend to persons located outside the territory of the United States." I know no basis for that view. There is nothing to support it in the language of Article 33 or in the record of the proceedings of the Committee that drafted it. I do not recall any expression to that effect by any member of the Committee. In my view, that conclusion would be contrary to the object, and purpose, and spirit, of Article 33 as the Committee conceived it.
4. By their terms, the bulk of the provisions of the Convention do in fact apply only within the territory of the state parties. That is because the principal purpose of the Convention was to provide economic and social benefits for refugees in the country in which they are resettled. Article 33 is of a wholly different character. It is an exceptional provision designed for an exceptional humanitarian purpose. Those who drafted the Convention recognized that governments were not prepared to commit themselves to grant asylum, even to *bona fide* refugees. However, as an exceptional, humanitarian act, governments were asked to commit themselves not to prevent a person from escaping oppression and not to become an accomplice to their oppression. Article 33 provided that if a refugee had escaped or was escaping

oppression, other governments should not prevent the escape by returning the refugee into the hands of his (her) oppressors.

5. That was the purpose and purport of Article 33. There was no thought of distinguishing for that purpose between those who had already entered a state's territory and those who were merely knocking on its doors. Surely, we did not intend a provision that, while prohibiting a state from handing a refugee already in its territory over to his (her) oppressors, would permit a state to reach out beyond its borders to seize a refugee and return him to his oppressors.
6. When the Committee drafted Article 33 we had in mind primarily persons seeking refuge across land boundaries: there had been stories, and some evidence, that police of some countries had pushed refugees back into the hands of the pursuing Nazis. Article 33 was designed to prohibit such heartless behavior. The Committee did not consider the case of refugees coming by boat in particular, but the sentiments moving the draftsmen and their governments applied to them as well.
7. No one could anticipate how many refugees might claim the privilege of *non-refoulement*. Some delegates did express the concern that the right of *non-refoulement* should not become a vehicle for requiring the admission of massive numbers of migrants. But none of our discussions suggested any intent to condone a state's denying the right of *non-refoulement* to members of groups, without individually determining—through screening or other means—whether each individual qualified for refugee status. No government sought to reserve the right to reach out beyond its borders, seize potential refugees, and return them into the hands of their oppressors. By expressing a caveat about mass migrations, the delegates were confirming that the right of *non-refoulement* attached to individual refugees and not to groups. They were not limiting the territorial reach of Article 33.
8. When this point arose before the *Ad Hoc Committee* on Feb. 10, 1950, I expressed agreement that Article 33 imposed no requirement of admission to refugees, but cautioned:

It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, . . . the problem was more or less the same. Whatever the case might be, . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

Summary Record of the Twentieth Meeting of the *Ad Hoc Committee on Statelessness and Related Problems* held Feb. 1, 1950, U.N. Doc. E/AC.32/SR.20.

9. Mr. George Warren attended the Conference of Plenipotentiaries as the U.S. delegate at the July 11 and 25, 1951 sessions, but he and I had no disagreement regarding this point. My statement the previous year, cited in paragraph 8 *supra*, continued as the official position of the United States government with regard to the meaning of Article 33. Mr. Warren took no action to rescind that interpretation or to support any other interpretation.

10. In short, as I understood Article 33, and as I believe all members of the Committee understood Article 33, it amounted to this: a state would not be obliged to admit any refugee. But a state could not seize a refugee in its territory and hand him over to his oppressors. It may not—indeed, *a fortiori*—reach out beyond its borders, pick up a refugee off of the high seas and forcibly return him into the hands of his oppressors.

Respectfully submitted,

Louis Henkin

Signed and sworn before me on
this 15th day of December, 1992.

Notary Public
New York, N.Y.
December 15, 1992